

EFFECTIVE APPLICATION OF COMPETITION LAW AND THE RIGHT TO FULL COMPENSATION

Class actions as potential instruments in the private enforcement of
EU competition law

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<p>Tiivistelmä/Referat – Abstract</p> <p>After a legislative process that lasted nearly a decade, the Directive 2014/104/EU on antitrust damages actions was adopted in 2014. Although it being proposed by both the Green and White papers preceding the Directive, the Commission decided not to include collective redress as a part of its final proposal. This study focuses on answering the question whether a class action instrument would benefit and ensure the effective application of the Directive on antitrust damages actions. The study outlines what characteristics such an instrument would need to have in order to serve the purposes of the Directive as well private enforcement of EU competition law in general. To answer these questions, the study combines the methods of legal dogmatics and normative theory of regulation.</p> <p>The need for competition law damages actions in the EU has by the ECJ been motivated with the need to ensure full effectiveness of EU law. The Commission has seen actions for damages as a supplementary mean of enforcement. At the same time, there is a right of all harmed individuals to claim compensation and one of the central principles in the Directive on antitrust damages actions is the right to full compensation. Taking into account the principles of effectiveness and equivalence it is motivated that member states undertake measures that grant all victims with the right to claim and obtain full compensation access to court. The fact that all victims, including indirect purchasers and victims of umbrella pricing can claim damages lead to that damages will be widely dispersed and pulverized. This creates a need for class actions.</p> <p>Class actions can be used both for regulatory purposes and creating access for justice for individual claims that would otherwise not end up in front of a court. The study gives an outline of these functions as well as different models of class actions and other collective actions. The study examines collective redress in three member states, where the potential functions of class actions have been made use of in different ways. The potential to use these instruments for competition law damages actions differ. The different conditions in regard to class actions in the EU impede the objective of the Directive to harmonize the conditions for actions for damages.</p> <p>The study assesses whether there is a need for class actions in the field of damages actions for competition law infringements, as well as whether class actions are suitable regulatory instruments for achieving the purposes of private enforcement. Welfare effects, the need for compensating consumers and other potential victims as well as the potential of class actions to create settlements are examined. In addition, the risks of overenforcement and undermining leniency are briefly discussed.</p> <p>The study concludes that a suitable class action instrument for claiming antitrust damages in the EU framework would be an opt-in instrument. In order to enable cases to actually be brought in front of national courts, there is a need for certain flexibility in regard to standing and financing. It is motivated to introduce mechanisms that lower the threshold for individuals themselves to exercise their right to claim and obtain full compensation. At the same time, the competition law enforcement landscape in the EU is not in need of deterrence created by mandatory class actions.</p>			
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Case Law

European Union

European Court of Justice

Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 000001

Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (1976) ECR 01989

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Airfreight (Case COMP/39258)

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Turun Hovioikeus, 6.9.1996, tuomio 2797, dnro S 95/357

Helsingin Käräjäoikeus, 4.7.2013, välituomio 36492, dnro 11/16750

The Market Court

MAO:614/09

The Supreme Court

KKO:2016:11

The United Kingdom

Court of Appeal (Civil Division)

JJB Sports PLC and Office v Office of Fair Trading [2006] EWCA Civ 1318 (19 October 2006)

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Soft Law

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Abbreviations

CAT	United Kingdom Competition Appeals Tribunal
DG COMP	European Commission Directorate General for Competition
DG SANCO	European Commission Directorate-General for Health and Consumers
ECJ	European Court of Justice
NCA	National competition authority
SME	Small- and medium sized enterprises

1. Background, Research Questions and Methodology

1.1 The Evolution of Private Enforcement in EU Competition Law

‘Astonishing diversity and total underdevelopment’ was how the state of damages actions for competition law breaches in the EU member states was described in the 2004 Ashurst report prepared for the Commission.¹ This report is often seen as a starting point in the long preparatory process that eventually resulted in a Directive on antitrust damages actions being adopted in late 2014.² A couple of years before the Ashurst report was published the ECJ had given its seminal judgment in the case *Courage*. The preliminary questions submitted to the court in the case followed the fact that English law barred parties to illegal agreements from claiming damages from the other party to the agreement. The ECJ found that the treaty precluded this kind of national rule in the case where a party to an agreement liable to restrict and distort competition would be barred from claiming damages for a loss caused by the performance of the contract. The ECJ in its judgment stated the right for any individual to invoke a breach of article 101 before a national court.³ The ECJ asserted that the ability for a harmed individual to claim damages for breaches of EU competition law is prerequisite for the full effectiveness of EU competition rules.⁴

The logic employed by the ECJ in *Courage* is in no way unique as to competition law as it has also been employed in several other fields of EU law. As a matter of fact, the evolution of private enforcement of competition law can in many ways be seen as a part of the evolution of a general framework of EU law on private enforcement.⁵ The ECJ first established the doctrine of direct effect, meaning that certain provisions in the founding treaties of the European Union create individual rights that national court must protect, in the judgment *Van Gend en Loos*. This principle has further developed over time, which has also had consequences for remedies and procedural rules of national judiciaries.⁶ The legal effects created between private individuals by articles 101 and 102 TFEU were for the first time

¹ Ashurst report, 1.

² However, both the thought of strengthening private enforcement of EU competition law and the idea of doing this through secondary legislation was born and discussed earlier. See Wilman, 202-205 for an account on the ‘early developments’ of private enforcement from the 1960’s to the year 2000. See also AG Van Gervens opinion in the 1993 judgment *Banks*, according to which national courts would in principle be obliged to award damages for losses created by a breach of EU competition rules with direct effect.

³ *Courage*, para 24.

⁴ *ibid*, para 26.

⁵ Wilman, 3-14.

⁶ *ibid*, 10-19.

acknowledged by the ECJ in its judgment *BRT v Sabam*. Later on, cases such as *Courage* and *Manfredi* significantly developed what these legal effects entailed.

The effectiveness of substantive EU law is often dependent on the procedural rules and remedies available for private individuals in the national legislations of the member states.⁷ In regard to private actions for damages in the field of antitrust, this was also one of the most central issues identified in the Ashurst report, as well as the subsequent Commission Green paper 2005 and White paper 2008.

Strengthening the private enforcement of EU competition law resulted also from the adoption of Regulation 1/2003 that decentralized the application of articles 101 and 102 TFEU, providing the national courts and competition authorities of the member states with the right to apply the articles.⁸ It is the national courts of the member states that are the responsible judicial actors in regard to enforcing the rights and obligations that are produced between individuals by articles 101 and 102 TFEU.

The above-mentioned Ashurst report identified a number of obstacles for private enforcement in member states. In order to facilitate the private enforcement of articles 101 and 102 TFEU, the report also outlined key measures through which private enforcement could be facilitated. Among the factors listed by the report, numerous of the elements that ended up in the final Directive on antitrust damages actions a decade later can be found. These include the question of what effect prior decisions of competitions authorities have, the question of indirect purchasers and the pass-on defence, as well as the question of facilitating proof and evaluating damages.⁹

The Ashurst report also outlined class actions, collective claims and representative actions as potential facilitators of antitrust damages actions. The report saw them as a means to improve access to courts¹⁰ but also as a way to reduce risks of litigation for claimants¹¹. In the subsequent Green paper collective actions are presented as an option especially for ‘defending consumer interests’ and enabling consumers and purchasers with small claims to bring actions for damages. In addition to enhancing the consumer interest, the Green

⁷ Wilman 12.

⁸ See for example the Commission staff working paper 2005, 11.

⁹ Ashurst report, 118-135.

¹⁰ *ibid*, 119.

¹¹ *ibid*, 123.

paper stresses the benefits collective actions can have from the point of view of procedural economy.¹²

Also the White paper 2008 saw as central the introduction of some kind of collective redress mechanism, or as the issue was formulated in the accompanying commission staff working paper:

It is therefore necessary to design facilitating measures enabling consumers and small businesses to effectively seek redress in court for the harm suffered from competition law infringements. These measures would play an important role in rendering the victims' right to antitrust damages more effective in Europe.¹³

The white paper suggested introducing two separate mechanisms. Firstly, the introduction of so-called representative actions where an entity such as a consumer association, trade association or state entity would act on behalf of identified, or in restricted cases identifiable victims was proposed. The second proposed mechanism was a so-called opt-in collective action, through which victims would be able to make the choice to aggregate their individual claims into one action.¹⁴

In 2014, a decade after the Ashurst report had given its view on the undeveloped state of play for private actions, the Directive on antitrust damages actions was finally adopted. Containing provisions that to a certain extent harmonize both national tort law and procedural law¹⁵, the Directive touches upon an intersection of domains that are normally tightly kept in the area of member state autonomy. Furthermore, this intersection of domains makes the process of advancing private enforcement such a long and winding road. Although the Directive attempts to harmonize and level the field for claiming antitrust damages in the member states, this is easier said than done. One of the key obstacles in this process turned out to be collective redress.¹⁶

As a matter of fact, class actions and collective redress will be what this study will be focusing on. In other words, the main focus of the study will be what was in the end not harmonized by the Directive on antitrust damages actions and if after all, using them for antitrust damages actions would be sensible from a regulatory point of view.

¹² Green paper 2005, 8.

¹³ Commission staff working paper 2008, 16.

¹⁴ White paper 2008, 4.

¹⁵ See for example Bernitz 2016, 4.

¹⁶ See for example Lianos, Davis and Nebbia, 33.

1.2 Research Questions, Scope and Outline of Study

1.2.1 Research Questions and Scope

The research question that will be addressed in this study is if a class action instrument would benefit and ensure the effective application of the Directive on antitrust damages actions and the of characteristics such an instrument would need to have in order to efficiently fulfill this goal. The Directive on antitrust damages actions will in this regard serve as a general framework. It must however be taken into account that the Directive on antitrust damages actions can obviously not be taken into account without addressing the case law and EU law that ‘surrounds it’ and that it to a certain extent codifies.¹⁷ This is also why this legal context will naturally be a part of the general framework mentioned above. The research question also in this regard answers a broader question if a class actions instrument can advance and benefit the goals of private enforcement of EU competition law.

It must be noted that the notion of private enforcement of competition law is in no way restricted to actions for damages. The right to seek injunctive relief in order to stop a violation or invoking the unenforceability of a contract because it violates article 101 TFEU are important examples of this. In this study however, what will be primarily meant when referring to private enforcement will be actions for damages. Similarly, many of the existing class actions models provide an opportunity to both seek injunctive relief and claim damages. Because of the focus on the Directive on antitrust damages actions and its compensatory objectives, this study will mainly be focusing on class actions as a tool for damages actions.¹⁸

When it comes to terminology, in the EU context the American sounding *class action* seems to have been abandoned for the broader *collective redress*. Both terms will, in this study, be used interchangeably, depending on the specific context. When a more specific class action or collective redress model will be referred too, this will also be noted in the text in order to make the account as clear as possible to the reader.

¹⁷ Castrén and Puskala, 398.

¹⁸ See Aine, 109 according to whom the fact that the Directive on antitrust damages actions is restricted to actions for damages is a result of that a more comprehensive approach to private enforcement of competition law had to be given up in the process leading up to the Directive.

1.2.2 Outline

In order to answer the research question, this study is divided into seven chapters, each one addressing and examining certain aspects of the question. The current chapter provides a background to the study and presents the research question, outline and methodologies used in the study. The next chapter, chapter two, will examine what private enforcement of EU law is, how it fits into the overall enforcement context and what the legal implications of the Directive on antitrust damages actions are. Also the harm caused by antitrust infringements, why it is compensable and who are potential victims are examined. Two very important parts of the analysis will be examining the concept of full effectiveness of EU law as well as the Directive's right to claim and obtain full compensation. This chapter will in many ways define the legal and regulatory framework which potential class action mechanisms would be operating within, and which objectives they should be serving.

Chapter three will examine class actions. Firstly, the potential functions of the instrument will be examined. Secondly, some of the alternatives and models used for class actions will be outlined. Also other forms of collective actions and instruments landing somewhere in between joinders of actions and class actions will be examined. This is done partly to explain in what ways the different functions of class and collective actions can be employed, as well as to see how the way a class action instrument is designed can serve different functions. Finally, these functions are discussed in regard to the approach of the European Commission and antitrust damages actions.

The subsequent chapter four will give some practical examples of the above-mentioned as it aims to examine some of the current collective redress regimes in the EU, namely in Finland, Sweden and the United Kingdom. The objective is not to attempt a comparative study, or an exhaustive description on collective redress across the EU. The objective is foremost from the perspective of normative theory of regulation, to examine some of the systems that are already in use and contrast them with the objectives of the Directive. In other EU countries there are several interesting class action models that could have been included, but because of the restricted space as well as the language knowledge of the author, the three above systems were chosen. The three chosen systems are also motivated in the sense that they all have different characteristics that are interesting from the point of view of providing answers for the research question.

In this context it can also be worth to note that also references to the US system of class actions and antitrust enforcement will be made throughout the text. This serves another purpose from that of comparative legal research. Firstly, it is necessary to have some kind of a benchmark that can be taken as a starting point when discussing different class action models. In this text, given its established role, the US federal rule 23 class action model will to some extent serve as this benchmark. It is however important to bear in mind that the rule 23 class action will be presented in a very general manner. Secondly, in some situations it becomes necessary to discuss and highlight the economic models that the US system of private enforcement and class action relies on in order to illustrate and discuss the models that could and should be implemented in Europe. In the analysis of the US system, both American and European source material will be utilized.

Chapter five will continue to draw on the conclusions made in the previous chapters and examine whether there actually is a need for introducing a class actions instrument when it comes to the goals of the Directive on antitrust damages actions and of private enforcement of competition law. Firstly, a set of theoretical models for assessing the need will be introduced. Secondly these questions will be answered by considering the welfare effects of class actions, what need there is to compensate consumers for harm caused by antitrust infringements, if others than consumers need access to class actions and the potential risk of overenforcement and undermining leniency. Finally, the potential of class actions in regard to settlements will be briefly examined.

Chapter six will draw on the conclusions of the previous chapters, presenting some characteristics that an ideal class action instrument should have in order to facilitate the application of objectives of the Directive on antitrust damage actions. In the final chapter seven, some concluding remarks will be presented.

1.3 Methodology: Remarks on Legal Dogmatics and Normative Theory of Regulation

The research questions described in the previous sub-chapter will be answered by utilizing two different methodologies. Firstly, in order to examine the objectives of the Directive on antitrust damages actions, and the legal framework of actions for damages for competition law breaches, a more traditional legal dogmatic theory will be used. Secondly, when assessing regulatory choices made and in particular the need for a class action instrument, the

methodology will be based on normative theory of regulation. To simplify, chapter 2 will primarily be focused on making a dogmatic analysis whereas chapters 3-6 are more focused on normative theory of regulation. This however is a very general distinction only, as both methodologies will be used throughout the study.

The aim of legal dogmatics is to interpret and systematize legal norms.¹⁹ As mentioned above, the Directive on antitrust damages actions and the surrounding EU-law will serve as a general framework for this study. In other words, what will be interpreted are the objectives of the Directive on antitrust damages actions, and legal rules concerning private actions for damages in competition law. In order to make an interpretation, the Directive itself but also several preparatory documents leading up to it will need to be examined. Also non-binding soft-law tools²⁰ become important in the context of this study.

In EU law, the case law of the ECJ and especially the ratio decidendi of its judgments are important legal sources.²¹ As will be seen, they have played an extremely important part in shaping the current regime of private enforcement of EU competition law. A lot of this case law is as a matter of fact now codified in the Directive on antitrust damages actions. This is also why they will be at the center of a significant part of the dogmatic analysis within this study.

Normative theory of regulation focuses on finding the most suitable regulatory option to serve a certain social goal.²² Important yardsticks against which the suitability of different regulatory alternatives is measured include assessing the flexibility of the legislation in regard to changes in external factors, and determining if the desired results will be reached with chosen regulatory option as well as if the desired results through the regulatory option can be reached at the lowest cost possible.²³ Normative theory of regulation differs in its approach from the positivist theory of regulation. The positivist theory, inspired by the public choice theory– school focuses on how the interests and preferences of individuals and different groups shape regulation and the legislative process.²⁴

¹⁹ Aarnio, 48.

²⁰ Raitio, 233.

²¹ *ibid*, 234.

²² Määttä 2002, 133.

²³ Määttä 1999, 14.

²⁴ Määttä 2002, 133-134. See also Ogus, 59.

Choosing to set this study within the theoretical framework of regulatory theory is relevant as there is a clear social goal that is pursued by the introduction of the Directive on anti-trust damages actions – a more efficient enforcement of EU competition law and through that a more competitive internal market. According to Ogus, regulation can be identified by its directive function but also by it being public law in the sense that authorities enforce it, and centralized, as the state functions as the enforcer.²⁵ Määttä has defended stretching the scope of the theory of regulation also into the domain of private law, as it is not at all only public law that today is utilized as a legislative alternative for reaching regulatory goals.²⁶ As we have already seen, as a matter of fact the regulatory goal of a competitive market has through enhancing private enforcement partly been decentralized to national courts and is as a matter of fact being enforced by claims of individuals.

Wilhelmsson has argued that the functions of liability law have as a general trend increasingly developed into including regulatory and supervisory functions.²⁷ Reaching regulatory goals using private law is exactly what private enforcement of competition law is about, although individuals through private actions are trying to advance their own welfare-maximizing goals, private actions are from the macro-perspective used to advance a public goal. In this sense it must be seen as highly relevant to be able to assess the regulatory option of private enforcement and class actions against other potential public and private enforcement options.

²⁵ Ogus, 2.

²⁶ Määttä 2002, 135.

²⁷ Wilhelmsson, 52-54.

2. Setting the Framework: Private Enforcement and the Directive on Antitrust Damages Actions

2.1 Tasks and Objectives of Private and Public Enforcement of Competition Law

2.1.1 The Three Functions of Competition Law Enforcement

Enforcement systems are established in order to ensure compliance with competition law. According to Posner, an optimal enforcement system is one where a reasonable degree of compliance with the law is secured at a reasonable cost.²⁸ Posner, as well as others see the prevention of future violations by creating a deterrent effect as the main objective of anti-trust enforcement.²⁹ Compensation is another, although supplementary objective. According to Posner, in a system of adequate deterrence violations will be few. In addition, a system with adequate deterrence provides adequate compensation as a by-product except for when the cost of compensation becomes too expensive.³⁰ The latter argument may not be considered entirely relevant in application the EU competition law regime which lacks the treble damages of the US system and where deterrence is ensured mainly by sanctions issued by public enforcement. The reason for this is that public sanctions will naturally not compensate individuals.³¹

Speaking from a European perspective, Wils gives antitrust enforcement three main functions. Just as with Posner, the central task is preventing violations of the prohibitions set up by competition law. This is primarily achieved by creating a system of penalties that shifts the balance between the costs and benefits of committing a competition law violation but also with other ‘softer’ measures that strengthen the commitment to rules. The second function is to clarify the content of the prohibitions. This function is achieved both by ex ante guidelines as well as by judgments and decisions following a violation. The third function is ‘dealing with the consequences of violations’, in other words providing corrective justice when a violation has already taken place.³²

²⁸ Posner, 2001, 266.

²⁹ *ibid.* See also Wils 2008, 51.

³⁰ *ibid.*, 267.

³¹ However, note discussion on the following page (n 35) regarding the potential compensatory function of fines.

³² Wils 2008, 50-54. Compare with Komninos, 141-142, according to whom there are three interconnected objectives: the injunctive objective that strives the end ongoing infringements, the restorative or compensatory objective that aims to remedy harm caused by infringements, and the punitive objective that strives to punish the infringer as well as deter future violations from taking place.

In the EU, fines are employed as the main tool for creating prevention and deterrence by the public enforcement machinery. In addition to acting in as a preventive measure for potential future infringements, fines normally have the disgorgement of unjust enrichment as an additional effect.³³ An ‘optimal fine’ is generally held to be a fine that exceeds the gain made by the infringer (in other words the social loss caused by the infringement), simultaneously applying a multiplier in inverse proportion to the probability of detection and punishment.³⁴ The disgorgement of unjust enrichment as a ‘side-effect’ can according to Wils also be seen as a kind of ‘corrective justice’ with the fines ending up in the public budget rather than at the potential victims of the infringement.³⁵

According to the Commission guidelines on the method of setting fines, a fine is determined with reference to the value of sales of the undertaking as well as the number of years the infringement was on going. This basic amount can then be adjusted up or downwards depending on circumstances.³⁶ From time to time there has been criticism on EU fine levels being too low to efficiently deter collusion. For example according to Connor, analysing sanctions imposed on international cartels detected between 1990 and 2003, the median total of Commission imposed sanctions amounted to only 32 % of estimated overcharges in the EU.³⁷ On the other hand, in a 2013 paper by Connor and Miller analysing data on corporate participants in global-hard core cartels between 1990-2010, it was presented that the Commission guidelines on the method of setting fines correspond fairly well with optimal deterrence theory and that since the revised guidelines on the method of setting fines were introduced in 2006, fine levels have increased.³⁸

After the adoption of regulation 1/2003 the public enforcement of articles 101 and 102 is assigned to the Commission, NCA’s and national courts. The enforcement powers assigned by regulation 1/2003 give the commission or NCA’s rights to for example under a threat of penalty request for information or inspect premises of businesses. These powers quite self-evidently give these actors an advantage to establishing if there has been a competition infringement or not, compared to if the man on the street or even a competitor that has as-

³³ *ibid*, 55.

³⁴ Wils 2003, 12. See also Posner 2001, 269 according to whom the correct formula is the social cost of the infringement inversely multiplied with the probability of detection and punishment. This view represents the Chicago school that sees prevention of inefficient violations, as opposed to all violations as the goal.

³⁵ Wils 2008, 55.

³⁶ For a more detailed account see the Commission guidelines on the method of setting fines.

³⁷ Connor, 212. See also Impact Assessment Study 2007, 73-74.

³⁸ Connor and Miller, 32-34.

signed the best business lawyers possible would try to establish and prove the existence of an infringement.³⁹ Another important difference of private enforcement compared to public enforcement is that as it rests on the initiative of private parties, there is not the same systematic approach to it as there is to public enforcement.⁴⁰

Private enforcement of competition law takes place when a victim of a competition law infringement takes legal action before a national court.⁴¹ In the field of private enforcement of competition law, actions for damages can be divided into two different categories of actions. So called *follow-on* damages actions are actions that follow a public decision made by a competition authority. *Stand-alone actions* are actions for damages that are initiated without a preceding public enforcement decision. An important difference between these two categories of actions is that the claimant's risks and costs diverge depending on the type of action. As a violation has already been established in a follow-on action, the claimant's risk and costs are not similar to those of a stand-alone action.⁴² For the above-mentioned reasons stand-alone actions are less frequent than follow-on actions, although they can be said to generate a greater public value as they identify violations that otherwise would not be identified.⁴³

Although the creation of deterrence that prevents future competition law infringements is usually assigned to administrative fines, private enforcement might also play a part in creating deterrence. To which extent deterrence is created naturally depends on to which extent and how damages are awarded in the private enforcement system. For example, by allowing punitive damages, a punitive objective is assigned to competition law damages.⁴⁴ Here it has however to be noted that not only punitive damages has the ability to create deterrence. From the deterrence perspective of the infringer, transaction costs, administrative fines and punitive damages all have the same economic effect.⁴⁵

2.1.2 The Twofold Concept of Effectiveness

According to the ECJ in *Courage*, the right to claim damages before a national court strengthens the overall working of EU competition rules, thus 'actions for damages before

³⁹ See also Pohlmann, 158.

⁴⁰ *ibid.*

⁴¹ Commission staff working paper 2005, 6.

⁴² Ezrachi and Ioannidou, 202.

⁴³ *ibid.*, 202-203.

⁴⁴ Komninos, 143.

⁴⁵ Hodges 2008, 243.

the national courts can make a significant contribution to the maintenance of effective competition in the Community.⁴⁶ The ECJ in other words sees the right to claim damages as an integral part of the overall enforcement of EU competition law. Here, as in other cases where the ECJ has asserted the right of private individuals to invoke EU law in national courts, also lies a more or less explicit assumption that these private claims will advance the public interest. As a matter of fact, private claims are seen as desirable especially from the point of view of public interest.

Securing the effectiveness of the EU competition rules is a central element behind the reasoning of the ECJ in *Courage*. If the opportunity for any individual to claim damages caused by a loss following a breach of article 101 would be restricted it would, according to the ECJ, put the full effectiveness of article 101 at risk.⁴⁷

Francovich is the first case in EU law in which the ECJ ruled that a breach of community rules could lead to liability for losses and damages. In *Francovich* the liability created was a liability of member states towards individuals. The background of the case was the failure by the Italian state to implement the Directive 80/987 that had the objective of guaranteeing a minimum level of protection of employees in the case of the insolvency of the employer. As a result of this failure, the parties of the main proceedings in the national court had not received the unpaid wage claims they would have been entitled too, had the Directive been duly implemented.

The ECJ found the liability of members states for loss and damages they have caused to individuals by breaches of EU law to be inherent to the system of the treaty.⁴⁸ According to the ECJ, the full effectiveness of community rules would be impaired and the protection of the rights that they grant weakened if individuals would be unable to obtain redress when their rights under community law had been breached and a member state could be held liable for it.⁴⁹ The ECJ seems to have held that the right to obtain damages for breaches of EU law is founded both on the need to ensure the full effectiveness of EU law but also on the existence of a de facto breach of the rights of an individual, causing harm that is to be compensated.⁵⁰

⁴⁶ *Courage*, para 27.

⁴⁷ *ibid*, paras 23-26.

⁴⁸ *Francovich* para 35.

⁴⁹ *ibid*, para 33.

⁵⁰ *ibid*, paras 33-35 and 39-41.

Francovich can be seen as a relevant case in the context of antitrust damages actions as an analogy can be drawn to *Courage*. The former establishes liability of member states and the latter the liability of private parties for competition law breaches.⁵¹ Wilman points out that as clarified by the ECJ in *A.G.M-COS.MET*⁵², the purpose of member state liability developed in the *Francovich* case law was not deterrence or sanction but compensating individuals for damages they have suffered because of breaches of EU law. According to Wilman, the role of liability for damages as an ‘addition’ to the overall enforcement of EU law is a much more central element in *Courage* than in *Francovich*. Despite of this, also the principle of member state liability developed in *Francovich* ‘should be understood against a background of an “enforcement deficit” originating in an inadequate implementation of EU law in member states.’⁵³

The comparison between *Francovich* and *Courage* partly exposes how similar reasoning by the ECJ in regard to public and private liability for breaches of EU law also shaped the principles that were prevalent in the legislative initiatives of strengthening private enforcement of competition law in the European Union. One can still see a significant jump being made from the case law of the ECJ to the Commission’s attempts to codify it. In *Courage* the ECJ found a national bar preventing actions for damages being inconsistent with community law. In the subsequent Green paper 2005 and White paper 2008, leading up to the now adopted Directive on antitrust damages actions, the Commission actively promoted actions for antitrust damages as a supplementary way of enforcement.

In this sense it seems that the doctrine of effectiveness has in some ways been confounded with, or even replaced, the consideration of the optimal enforcement of competition rules. This view is supported by a similar analysis by Nebbia that in 2008 noted how the discussion on actions for antitrust damages has deviated from its initial jurisprudential meaning. Nebbia, discussing the Green paper that laid out how ‘the *Courage* judgment is based on a long established jurisprudence of the Community Courts relating to the effective protection of community rights by the courts of the member states’, points out that, ‘yet, during its migration from the Luxembourg to the Brussels arena, the debate seems to have shifted from “damages claims” to “private enforcement”’. Private enforcement is, as Nebbia notes,

⁵¹ Wilman, 57.

⁵² *A.G.M-COS.MET*, para 88.

⁵³ Wilman, 57.

semantically more linked with ensuring compliance with regulations and law than actions for damages.⁵⁴

Nebbia suggests that the doctrine of effectiveness that the court also relies on in *Courage* actually can be conceptualised into a twofold concept. Firstly, effectiveness can be understood as ‘effective enforcement’.⁵⁵ Secondly, it can be understood as a principle concerned with ensuring ‘effective judicial protection’.⁵⁶ The ECJ has variedly relied on either one or both of these two concepts in its case law.⁵⁷ According to Nebbia, the concept that *Courage* relies on is the one of effective judicial protection.⁵⁸ Going back to *Francovich*, the case law of the ECJ has also from time to time combined these two, as the judgment ‘completed the system of judicial protection of individuals and considerably strengthened the possibilities of enforcement of Community law’.⁵⁹ In this sense it is rather interesting to note how the same ‘formula’ of effectiveness is applied throughout many sectors in the case law.

2.1.3 The Disputed Need of Private Enforcement

As becomes rather evident from the Commission’s White paper 2008, the intention of developing private enforcement is not to replace public enforcement in any way but to complement it.⁶⁰ Still, it is in the White paper also stated that improving compensatory justice will ‘inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules’.⁶¹ According to Komninos the existence of a private enforcement system produces deterrence by ‘adding a supplementary system of sanctions and risks for the wrongdoer’.⁶² The objective of the European Union of building a private enforcement regime to complement strong public enforcement is in rather sharp contrast with the other significant competition regime of the world, namely that of the United States. In the US, a crushing majority of antitrust cases are private suits.⁶³ The reliance on private enforcement as a way of attaining also public objectives is based

⁵⁴ Nebbia, 24.

⁵⁵ *ibid.*, 29-30.

⁵⁶ *ibid.*, 30-34.

⁵⁷ *ibid.*, 29-34.

⁵⁸ *ibid.*, 35.

⁵⁹ Prechal, 276.

⁶⁰ White paper 2008, 3.

⁶¹ *ibid.*

⁶² Komninos, 143.

⁶³ See for example the Sourcebook of Criminal Justice Statistics Online according to which around 90% of antitrust cases filed are private suits <http://www.albany.edu/sourcebook/pdf/t5412012.pdf>. See also Hovenkamp, 1.

on economic theory. Through private enforcement, firms that have by their behaviour caused negative externalities are forced to internalize the harm produced. This creates deterrence and consequently also compliance.⁶⁴ In this context, it is worth noting that the US system uses treble damages that are punitive to their nature.⁶⁵ Although compensation and disgorgement of unjust enrichment are also goals of the US model of private enforcement, deterrence has especially under the influence of the Chicago School, become the leading goal.⁶⁶

Not everyone has sided with the analysis of private enforcement as a prerequisite for the effective enforcement of competition rules. In a 2003 article Wils points out, firstly, that there is from the point of view of deterrence in competition enforcement no need to enhance private enforcement. Public enforcement is an ‘inherently superior’ and a more cost efficient way to ensure compliance with competition provisions.⁶⁷ If there is a need to increase deterrence, this can simply be done by raising the administrative fines issued by public enforcers.⁶⁸ Secondly, from the point of view of compensation, improvement of private enforcement might, according to Wils, be justified. The extent to which compensation is to be encouraged and facilitated depends upon how much value is being attached into the goal of corrective justice, especially as it in the field of antitrust is likely to be very costly.⁶⁹ Wils has not been alone in his critique, as for example Marcos and Sánchez Graells have asserted that antitrust damages typically being massive and often widely pulverized harm makes public enforcement much better suited to address the violation, especially because of its sanctioning power.⁷⁰

Another important consideration in this regard is the systemic assumption in the case law of the ECJ of private enforcement of EU law being beneficial from the point of view of public interest. As already pointed out above, private enforcement does not take a systematic approach to enforcement. That private actors will by enforcing their rights indirectly advance public interests is by large a disputed matter. Private actors will of course only

⁶⁴ Hodges 2008, 243.

⁶⁵ See for example Posner 2014, 394: ‘The successful antitrust plaintiff is entitled to a tripling of his compensation, so that two-thirds of every antitrust damage represents punitive damages.’ Compare with for example Lande, 344 who claims that the right to treble damages is usually purely nominal and most victims recover only single damages or less. See also Buxbaum, 52.

⁶⁶ Buxbaum, 43-46.

⁶⁷ Wils 2003, 11-15.

⁶⁸ *ibid.*, 16.

⁶⁹ *ibid.*, 20.

⁷⁰ Marcos and Sanchez Graells, 476.

choose to make claims when there is an individual benefit to be gained from making a claim. According to Shavell, individuals, when making a decision on whether to litigate or not, take into account neither negative externalities such as legal costs incurred to others, nor the positive social externalities such as deterrence that bringing a suit might create.⁷¹

If the main goal of improving the remedies of claiming damages for antitrust breaches is indeed, as will be seen below, compensatory justice or even full compensation, it is an interesting mean of enforcement. The nature of the right to claim and obtain full compensation will be discussed later in this study. Meanwhile, it can already be noted that as a mean to enforce competition law with the objective of ensuring well functioning competition, compensatory justice is not the optimal tool.

2.2 Status Quo or Full-Scale Revolution - What Does the Directive in Fact Change

The adopted Directive on antitrust damages actions was published in the official journal in late 2014. The deadline for transposition of the Directive into national legislation will be the 27th of December 2016. The processes of taking legislative measures for implementing the Directive are currently underway in member states. Some relevant parts of these proposals will also be discussed later on in this study.

The Directive on antitrust damages actions is in many ways attempting to harmonise the field for private antitrust enforcement within the EU. This field has traditionally been uneven due to member states having different provisions and legal traditions in the domains of both procedural and tort law. As is pointed out by Marcos and Sánchez Graells, this is in sharp contrast to public enforcement which is nearly fully harmonized throughout the union.⁷² The directive harmonizes procedural provisions that are relevant from the perspective of damages actions concerning competition law, a harmonization that according to Bernitz 'is partly of an entirely new kind'.⁷³

Also the right of individuals to invoke their rights and be protected from harm caused by competition law infringements is according to Aine strengthened through the Directive.⁷⁴

⁷¹ Shavell, 578-579.

⁷² Marcos and Sanchez Graells, 469.

⁷³ Bernitz, 496.

⁷⁴ Aine, 130.

This is in line with the case law of the ECJ in which the rights of individuals to invoke their rights has been an important building block of the private enforcement regime.

The Directive on antitrust damages actions consists of 23 articles. As a general framework, article 1 lays down as the objective of the Directive to ensure the right to claim and obtain full compensation for harm caused by competition infringements, as well as to ensure that this right can be effectively exercised. Articles 3 and 4 further substantiate the right to full compensation, with the former substantiating the content of the right to full compensation and the latter the principles of effectiveness and equivalence.

The remaining substantive provisions of the Directive concern disclosure of evidence (articles 5-8), effect of national decisions, limitation periods, joint and several liability (articles 9-11), passing on of overcharges (articles 12-16), quantification of harm (article 17), and consensual dispute resolution (articles 18-19).

The intention to create legislation with the primary goal of creating compensation was asserted by the commission already in the White paper 2008. The wording of the Directive also gives the impression of compensation as a leading principle. Nevertheless, compensatory justice must at least to some extent be seen as a false flagship. The main justification for enhancing compensatory justice is to improve the overall enforcement system. Bernitz, for example claims that the compensatory aim is ‘from a policy-perspective’, secondary to the deterrence aim.⁷⁵ Taking into account what has been said in the sub-chapters above, this seems, from the enforcement perspective, very logical. However, it is interesting to note that deterrence is mentioned neither in the recitals nor the Directive itself, and was given a secondary role also in the White paper 2008.

The recitals state that there is a need for member states to implement procedural rules ensuring the effective exercise of the right to claim compensation caused by competition law infringements.⁷⁶ Despite this, it cannot be claimed that the procedural requirements that are to be implemented are especially radical. For example, from the point of view in Finland, a large part of the Directive’s provisions has been claimed to already be found in the national legislation.⁷⁷ According to Bernitz, many of the obstacles for claiming damages are likely

⁷⁵ Bernitz, 496-497.

⁷⁶ Directive on antitrust damages actions, recital 4.

⁷⁷ Castrén and Puskala, 398.

to persist.⁷⁸ It can in other words be questioned if the Directive will deliver what it promises and if the background objectives motivating the legislative process of enhancing actions for damages will be reached.

A question essential to actions for damages that the Directive does not harmonize, but leaves up to the legal systems of member states is the concept of causation.⁷⁹ Although the case law of the ECJ has reiterated the need for a causal link as a prerequisite for liability⁸⁰, no definition of causation has been developed. The ECJ has left causation to be governed by the rules of member states observing the principles of effectiveness and equivalence.⁸¹ This is a clear contrast to for example the definition of who has standing, a question that has been thoroughly defined by the ECJ, as will be seen in the following sub-chapter.⁸² Also the notion of harm has largely been left up to the laws of the member states. Article 17(2) contains a rebuttable presumption of harm caused by the existence of a cartel. The question of how to quantify harm, in other words a crucial aspect when it comes to actions for damages, is left up to the national rules of the member states.⁸³

As stated above articles 18-19 of the Directive have the objective of facilitating consensual dispute resolution. According to the recitals the achievement of definitive settlements reduces uncertainty for both infringers and victims of infringements. Facilitating these kinds of settlements is thus desirable. According to the recitals consensual dispute resolution would also ideally cover as many injured parties and infringers as legally possible.⁸⁴

The Directive has adopted the concept of full compensation as its leading rationale. By the harmonization achieved by the provisions of the Directive it seems the right to claim and obtain full compensation can be facilitated, yet it seems highly unlikely that they would be the only measures that would need to be undertaken in order to fulfil the right to full compensation.

⁷⁸ Bernitz 2015, 507.

⁷⁹ Lianos, Davis and Nebbia, 72.

⁸⁰ *Manfredi*, para 61, *Kone*, para 22.

⁸¹ *Manfredi*, para 64, *Kone*, para 24.

⁸² Lianos, Davis and Nebbia, 72.

⁸³ *ibid*, 37. It can in this context be noted that the Commission has given a practical guide on the quantification of harm. This guide is however not in any way legally binding for national courts.

⁸⁴ Directive on antitrust damages actions, recital 48.

2.3 Who Can Claim Damages

It lies in the nature of competition law infringements that the harm they cause may be very widespread, pulverized and passed on through the supply chain. Linked to this is another important feature of antitrust damages, namely the characterization of them as pure economic loss.⁸⁵ In relation to characterizing antitrust damages as pure economic loss, is the observation that the liability for damages caused by an infringement of competition law can very well be said to rest on the foundations of public interest. In general, causing pure economic loss (especially to competitors) is often a distinctive premise of economic activity in market economies as well as an integral part of the competitive process. Causing pure economic loss becomes wrongful when the objective pursued is unlawful.⁸⁶ As an example of such unlawful activity is a situation where unlawfully hindering or impeding competition on the market pursues unjust competitive advantages or less competition. It can be argued that the public harm inflicted by breaches of competition law (violations that are also addressed through public enforcement) is also the reason to why pure economic loss caused by these violations should be compensated through tort law.

Wahl argues that the only actual loss that is created in a competition law infringement is the deadweight loss caused by the inefficiencies created. The deadweight loss cannot as such be compensated as it is nearly impossible to value, and there is no concrete victim.⁸⁷ Furthermore, competition law damages are not de facto compensation for loss but actually redistribution of the violator's gains (that can of course be seen as unjust enrichment) to the victim. Wahl thus stresses antitrust damages as a form of sanctions, even though they take the form of damages.⁸⁸

⁸⁵ The notion of pure economic loss is of diverging in different legal systems and traditions. For these purposes is here still meant a loss that occurs without antecedent harm to the victim's person or property. See for example Bussani and Palmer, 5-8 and Van Boom 2004, 2-4.

⁸⁶ Van Boom 2004, 15-16.

⁸⁷ Compare with Wils, n 35, according to whom sanctions paid to the public budget can also be seen as a form of compensatory justice.

⁸⁸ Wahl, 30. This is however not at all the view that seems to prevail in all member states. See TEM 46/2015 2015, 28. In the Finnish report preparing the national implementation of the Directive on antitrust damages actions, the nature of damages is discussed in context of article 18 the Directive allowing for consensual compensation as a mitigating ground for lowering fines issued for an infringement. According to the report, lowering sanctions because of consensual compensation is not an alternative to be nationally implemented, as 'the objective of paying damages is to compensate the victim for the damage caused by the infringement while a fine is an administrative sanction issued as a consequence for a breach of competition law.' This view, drawing a sharp distinction between damages and sanctions, in many ways tries to push in antitrust damages in a category where it does not fully fit.

The causality link between competition law infringements and the harm caused by them is often complicated to establish. Also the harm itself can often be hard to establish and quantify. The existence of similar complexity in other fields of tort law would in many cases, at least when speaking from a Nordic perspective, lead to harm not being compensable.⁸⁹

According to Keske, potential victims of competition law infringements can be classified into six different categories. Direct purchasers and customers are harmed due to increased prices or the welfare losses incurred when refraining from buying the product or switching to less favourable substitutes. In addition to the infringer's purchasers, customers of firms outside a cartel can be harmed as a result of so-called umbrella pricing that leads to an overall supra-competitive price level. Indirect purchasers are harmed as direct purchasers might pass on the overcharge caused by anticompetitive behaviour. Competitors can also be victims as anticompetitive behaviour might have a foreclosing objective or effect.⁹⁰

Although literature is often concerned with mainly purchasers as the potential victims suffering harm because of antitrust infringements, it should be taken into consideration that harm can exist also in the upstream direction of supply chains. Suppliers might very well be potential victims.⁹¹ A prime example of widely dispersed damages among suppliers are the damages inflicted to an estimate of 400 000 forest owners, as a consequence of selling wood at a price set by three colluding wood companies that were later found guilty of forming a cartel by the Finnish market court.⁹²

The classification above helps to give a general picture of the different types of victims that might suffer loss due to antitrust infringements. An important thing to keep in mind however, is that because of the different nature of different kind of infringements, the context and facts applicable to each infringement will determine the kind of relevant harm the infringement has given rise too.⁹³

After establishing all the potential victims that may suffer harm from antitrust infringements, the next step is to establish which ones of these potential victims will have the right to claim damages. From a total welfare perspective, it is not at all certain that facilitating

⁸⁹ Havu 2008, 175.

⁹⁰ Keske, 47. For another, yet similar classification of potential victims, see for example the 2007 Impact Assessment Study, 77.

⁹¹ See for example the Oxera study 2009, 27.

⁹² Viitala, 416.

⁹³ Havu 2013a, 112.

the claim for damages and providing everyone with compensation will be beneficial.⁹⁴ For example, Wahl has suggested that ‘an effective tort system in competition law would mean that victims with the potential and means to detect, as well as the lowest costs for bringing actions, should have the right to bring actions’. Victims not fulfilling these criteria should according to Wahl not be entitled to bring actions for damages.⁹⁵ As will be seen, the case law of the ECJ and the policy choices made in the Directive has led to a solution other than the one suggested by Wahl.

The right of any individual to address a breach of articles 101 and 102 was in principle already formulated in *Courage*⁹⁶ and was subsequently clarified in *Manfredi*, in which the ECJ affirmed that any individual may claim compensation for harm suffered, provided that there is a causal relationship between the harm and the infringement.⁹⁷ Although in hindsight any individual seems like a quite clear-cut definition, its meaning it was not clear at all in the beginning of the time following the judgments.⁹⁸ Subsequent case law and the Directive have clarified the situation. The result has been that the group of potential victims with the right to claim damages is more or less as broad as possible.

The Directive affirms the right for indirect purchasers to claim damages, with article 12 pointing out that the right to full compensation is irrespective of the purchaser being direct or indirect. The rules on passing on of overcharge in article 13 and article 14 on indirect purchasers also accommodate this right. This is an interesting contrast to the US where indirect purchasers are generally⁹⁹ not allowed to claim damages in accordance to the rule formulated in the *Hanover Shoe* and *Illinois Brick* judgments. In *Hanover Shoe* the Supreme Court dismissed the passing-on defence because of its practical complexity. The Supreme Court also pointed out that allowing for pass-on would disperse damages and the consumers at the end of the supply chain ‘would have only a tiny stake in a lawsuit, and little interest in attempting a class action’. This would according to the Supreme Court also lead to that there being no disgorgement of the unjust enrichment of the violator.¹⁰⁰ In *Illinois Brick* the Supreme Court reiterated the arguments of the *Hanover Shoe* judgment. In

⁹⁴ *ibid*, 113.

⁹⁵ Wahl, 234.

⁹⁶ *Courage*, para 24.

⁹⁷ *Manfredi*, para 61.

⁹⁸ Havu 2008, 184.

⁹⁹ This is the general case on federal and partly state level. However, some states allow also the standing of indirect purchasers. See for example Paulis, 14.

¹⁰⁰ *Hanover Shoe*, 494-495.

addition the Supreme Court pointed out that one of the benefits of private actions is the compensation it provides for victims but that it was not motivated ‘to carry the compensation principle to its logical extreme by attempting to allocate damages among all “those within the defendant's chain of distribution.”’¹⁰¹ According to Jones, this restriction has in the US facilitated antitrust claims and also ‘concentrate antitrust litigation claims in the hands of those most likely to sue’.¹⁰²

It is also interesting to compare the approach of the US Supreme Court to the jurisprudence of the ECJ. While the ECJ focuses on the rights of individuals to enforce their rights derived from the treaties, the Supreme Court in *Hanover Shoe* and *Illinois Brick* seems to make its judgment assessing the overall functioning of the enforcement system. On the other hand, allowing for passing on is according to Van Boom consistent with a compensatory goal, as he also notes that a system that does not allow for passing-on defence is more focused on the deterrence-rather than compensatory goal.¹⁰³

In the case *Kone*, the ECJ asserted that harm caused by so-called umbrella pricing was eligible for damages claims.¹⁰⁴ This means that also claims for damages that have a causal link to an overall supra-competitive price level, even though, there is no contractual link between the infringer and the harmed party, have been accepted as claims that are admissible for compensation.

The impact of making all potential victims, including indirect purchasers and victims of umbrella pricing, eligible to claim damages inevitably also leads to that the damages that are admissible for compensation becoming dispersed and widespread.¹⁰⁵ As already, mentioned above, it has been questioned if allowing and facilitating actions for damages for all potential victims is beneficial from the point of view of total welfare and efficiency.¹⁰⁶

However, the victim categories that will actually exercise their rights will also depend on the mechanisms that are available and to the extent to actions for damages are facilitated. For example consumers is a group of victims that can be both direct and indirect purchasers. Allowing consumers to sue will in many cases lead to that the damages to be claimed

¹⁰¹ *Illinois Brick*, 746.

¹⁰² Jones, 21.

¹⁰³ Van Boom 2011, 174-175.

¹⁰⁴ *Kone*, para 34.

¹⁰⁵ See for example Landes and Posner, 609. Also see the Oxera 2009 study, 116-122 for explanation and examples on how different infringements amount to different rates of pass on.

¹⁰⁶ Havu 2013a, 120.

will be very widely dispersed. How these damages will be compensated depends on the mechanisms that are available, how dispersed the harm is and how easy it will be to establish causation and harm.

2.4 The Right to Claim and Obtain Full Compensation

2.4.1 The Nature of the Right to Compensation

The objective to adopt a legal instrument that would especially enhance compensatory justice was clearly set out already in the White paper 2008 as full compensation was stated to be ‘the first and foremost guiding principle’.¹⁰⁷ In the Directive on antitrust damages actions, this ‘guiding principle’ had evolved into a right to compensation. What does this right entail and what are its legal implications?

Firstly, the right to full compensation can certainly be interpreted from the perspective of substantive rules on providing compensation found in the Directive on antitrust damages actions. As article 3(2) of the Directive on antitrust damages states, the principle of full compensation means *resitutio ad intergrum*, placing the victim into the position where he or she would be if the competition law infringement had not happened. From this point of view article 3 (3) is relevant as it declares that compensation shall not lead to overcompensation by punitive, multiple or other types of damages. The right to full compensation in accordance with article 3(3), includes the right to compensation for actual loss, loss of profit and the payment of interest. The right to full compensation is further substantiated by article 12 that also asserts the right for indirect purchasers to claim compensation.

According to Prechal ‘considerable uncertainty surrounds the concept of rights in community law’ and the case law of the ECJ does not provide any clarification on the nature or scope of rights created by directives.¹⁰⁸ In a similar manner, it is not entirely clear how the right to claim and obtain full compensation granted by the Directive should be characterized. Are there procedural demands, other than the provisions of the Directive, that member states need to observe to ensure the right to full compensation? What does the notion of the right to claim and obtain damages oblige the member states to do?

Examining the right to antitrust damages in the time before the Directive, Havu points out that it could perhaps be relevant to see the right to damages as a legal remedy rather than a

¹⁰⁷ White paper 2008, 3.

¹⁰⁸ Prechal, 111.

right within EU-law. The right to compensation has a significantly different nature than other kinds of more classical rights in EU law, such as the right to equal pay.¹⁰⁹ According to Havu, for a right to antitrust damages to be an actual substantive right, all the prerequisites for obtaining damages as well as the results of judicial proceedings should be identical throughout the member states.¹¹⁰ As already stated above, the Directive does not fully harmonize the conditions for damages actions in the member states.

Van Boom, pointing out that the nature of individual damages caused by competition law infringements is by definition pure economic loss, asserts that there are differences between the tort laws of different legal systems in regard to if pure economic loss is seen as harm where a retroactive remedy should be offered.¹¹¹ When it comes to the pure economic loss of competition law damages, these potential differences have been harmonized by the Directive on antitrust damages actions, as there is a right to claim and obtain compensation for harm.¹¹² Just like Prechal, Van Boom sees that the difference between the use of the terms ‘law’ and ‘rights’ in the EU legislature is somewhat unclear. As the public enforcement of competition law is nothing more than enforcement of law, it is somewhat peculiar if it becomes enforcement of rights of individuals in the private sphere. The alternative explanation is that the word right is a bit misplaced in the context and the right to full compensation in reality entails what Van Boom calls a retrospective remedy for protecting the economic interests of individuals.¹¹³

Adding to this, the notion of right is also interesting in the sense that the reparation of damages of competition law breaches is reparation of pure economic loss justified on grounds of public policy. The right to full compensation in this case thus differs from a right to full compensation that has occurred because of a damage of person or property.

It must be acknowledged that there are many aspects making the right to full compensation very problematic. For example the missing definition of causation means that there will be legal uncertainty and that the outcomes of cases in different member states might very well vary, undermining a uniform concept of full compensation. In regard to standing, some groups of victims such as direct purchasers or excluded competitors are in a much better

¹⁰⁹ Havu 2013b, 220.

¹¹⁰ *ibid*, 148.

¹¹¹ Van Boom, 2011, 172.

¹¹² Still, it is necessary to take into account all the difficulties still existing in regard to making these claims.

¹¹³ Van Boom 2011, 173.

position to prove causality than for example umbrella customers or indirect purchasers.¹¹⁴ Taking into account what has been said above as well as the areas of law harmonized by the Directive, the right to claim and obtain full compensation as meant by the Directive, must primarily be seen as a remedial right of individuals.

The right to obtain and claim full compensation for antitrust damages is an objective that is in many ways impossible to satisfy.¹¹⁵ What is difficult to determine is if the member states simply by implementing the provisions of the Directive have, in a satisfactory way, safeguarded the right to claim and obtain full compensation? This is a relevant question to ask even if the right to full compensation is not seen as a substantive right but as a remedy.

2.4.2 Full Compensation and Access to Justice

Regardless of if of the right to claim and obtain full compensation is seen primarily as a remedial or substantive right, a very logical conclusion to draw is that the right to claim and obtain damages is also directly linked with having access to justice. Access to justice means not only formal access to court, but also de facto access. Access to justice hence includes numerous factors guaranteeing that subjects are able to effectively exercise their rights.¹¹⁶ Taking into account the diverse group of victims allowed to claim antitrust damages, it is not hard to understand that access to justice is not similar for all of these groups.

In this context, it is noteworthy to recall that introducing some kind of mechanism for class actions, collective actions or representative actions was during an extensive period of the time during which the Directive was being prepared a part of the overall legislative package on antitrust damages actions. The recitals of the adopted Directive explicitly deny there being an obligation to introduce collective redress mechanisms, stating that ‘This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.’¹¹⁷ The explicitness of the cited recital clearly illustrates how there at the time of the adoption of the Directive still existed a clear

¹¹⁴ Lianos, Davis and Nebbia, 73.

¹¹⁵ See for example Keske, 184-187, criticizing the goal of full compensation as problematic partly because of the difficulty of establishing competition law damages but also because providing *full compensation for all victims* is not possible as compromises will inevitably have to be made between the two ‘in order to make the system of litigation workable.’

¹¹⁶ On access to justice see for example Frände et al., 48.

¹¹⁷ See recital 13 of the Directive on antitrust damages actions.

resistance to completely levelling and harmonizing the procedural playing field of bringing actions for damages in the field of competition law.¹¹⁸

It is relevant to consider both the right to claim and obtain full compensation as well as the national provisions on collective redress through the lens of the principle of procedural autonomy as well as the principles of effectiveness and equivalence. These principles will consequently be briefly explained below.

In *Courage* the ECJ asserted that, in observance with the principles of effectiveness and equivalence ‘in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law’.¹¹⁹ The ECJ through this reiterated the principle of national procedural autonomy, as first formulated in 1976 in the judgment *Rewe*. This principle entails autonomy of the member states to the procedural means regarding of the enforcement of EU law in national courts.¹²⁰ According to Wilman, the case law of the ECJ in regard to cases such as *Courage* seems to indicate that the ‘constitutive conditions’ of private enforcement in EU law should be uniform in the member states, whereas the ‘executive rules’ on the issue should be left up to the national laws of the member states.¹²¹ With the introduction of the Directive on antitrust damages actions there is to a certain extent a harmonization of the ‘executive rules and procedural rules’ for safeguarding the rights of individual. However, as already noted several times, crucial issues are left to be governed by national rules which means they are subject to the principles of effectiveness and equivalence.

As class actions were not included in the Directive there are no formal harmonization requirements for them. Despite of this, the Commission recommendation on collective redress, given in 2013 is a signal that the Commission thinks there is a need to harmonize collective redress mechanisms that can be used for addressing competition law breaches in the member states.¹²² Because provisions for harmonization on the matter were left out of the Directive, the availability of class actions is ‘governed by national law but subject to

¹¹⁸ See for example Lianos, Davis and Nebbia, 33 according to whom the adoption of the Directive was probably ‘much smoother’ as there was no provision on collective redress.

¹¹⁹ *Courage*, para 29.

¹²⁰ Wilman, 26.

¹²¹ *ibid*, 58.

¹²² See chapter 3.2.1 for more discussion on the recommendation.

EU principles of effectiveness and equivalence'.¹²³ These principles set limits to the member states autonomy to make decisions in regard to how EU law is enforced on the national level. Developed by the case law of the ECJ¹²⁴, the principle of equivalence requires that substantive and procedural provisions governing actions for enforcement of EU law cannot be less favourable than those governing similar actions based on national law, whereas the principle of effectiveness provide that the exercise of right conferred by EU law can not be made virtually impossible or excessively difficult by national procedural conditions.¹²⁵

Closely related to, although not the same things as, the principle of effectiveness is the principle of effective judicial protection that was developed by the ECJ in the 1980's.¹²⁶ According to some, the earlier principle has in some ways been 'absorbed' by the latter¹²⁷, which has also been reinforced by being included in the EU Charter of Fundamental Rights as the right to an effective remedy and a fair trial.¹²⁸ Prechal and Widdershoven point out that the principle of effective judicial protection is over time developing into a positive standard, obligating member states not only to disregard national provisions not conforming to the requirements of effectiveness or effective judicial protection, but also to create new national powers and remedies.¹²⁹

The policy choices made in regard to which victims can claim actions for damages has led to these claims being dispersed, and in many cases to what in the next chapter will be referred too as individually nonrecoverable. Ensuring access to court for these potential claimants can require more than just the implementation of the procedural requirements found in articles 5-18 of the Directive on antitrust damages actions. It would be quite a hyperbole to state that these facts connected to the right to full compensation would in some way obligate the member states to introduce collective redress mechanisms that would address these issues. Speculations can be made however on the obligation of, member states, to ensure, at least in some way, that there is some kind of remedy available that enables the recovery of small claims. This is supported that the wording of article 3(1) in the Directive as a matter of fact entail that 'Member states shall ensure that any natural or

¹²³ Jones, 40.

¹²⁴ See *Rewe*, para 5.

¹²⁵ See for example Prechal, 137. For the case law of the court in this matter see for example *Rewe*, para 5, *San Giorgio*, paras 14 and 18.

¹²⁶ Prechal, 144-145.

¹²⁷ Wilman, 39, see also Prechal and Widdershoven 38-44.

¹²⁸ *ibid*, 37.

¹²⁹ Prechal and Widdershoven, 40-41.

legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm' and the fact that the subsequent article 4 reiterates the principles of equivalence and effectiveness. This seems to indicate that ensuring full compensation is not restricted only to implementing the provisions found in the Directive. Although there is no obligation to introduce collective redress there is, however, a possibility that collective redress could, from the point of view of normative regulatory theory, be the most sensible mechanism for ensuring full compensation. What will be explored in subsequent chapters is the potential for collective redress to act as a mechanism ensuring the right to full compensation as well as playing a role in the overall framework of competition law enforcement.

2.4.3 Full Compensation as a Regulatory Objective

As already mentioned above, from the point of view of creating an optimal enforcement system, the objective of full compensation for all potential victims is problematic. In his 2003 article Wils pointed out that when pursuing a certain level of deterrence or corrective justice through compensation, it should be aimed for at the lowest cost possible. According to Wils, it is unlikely that full compensation is an optimal objective to strive for.¹³⁰ In chapter 2.5.1 it was also pointed out that full compensation is a more or less impossible objective to achieve, also an important reason to why the pursuit of full compensation comes at such a high cost.

The logic that the Directive and the entire developing system of private enforcement of competition law is based on, is the ECJ created doctrine of individual rights to address a violation of antitrust law that has caused the individual right holders harm. What is unclear is if the advancement of this individual right is primarily concerned with either the economic interest of individuals and their right to recover losses, or the effects that vigilant individuals enforcing their rights have on overall enforcement objectives. This is relevant because the way that national remedies are designed can have a bearing on the extent to which private enforcement works principally as a either compensatory or a deterrent remedy.

¹³⁰ Wils 2003, 10.

3. Potentials and Pitfalls: Class Action as an Instrument

3.1 The Logic Behind Class Actions and Other Group Litigation Procedures

3.1.1 Access to Justice and Internalization of Harm as Functions of Class Actions

When trying to make a general presentation about class actions the most obvious problem is that there is neither a generic model of class actions or collective redress, nor a scholarly consensus on what their primary or overarching function is. This is why this chapter will be devoted to clarifying these concepts. In addition this chapter classifies different models of class actions and collective actions with the aim that this classification will also benefit and be of use in the following chapters.

Class actions can be conceptualized as having two principal functions: the first being access to justice and the second being internalization of harm. Class actions can be also seen to have many other functions: providing compensation, developing and clarifying the law, creating procedural efficiency, deterrence and prevention as well as compliance.¹³¹ All of these, however, can be classified under one or both of these principal functions. In some ways this is perhaps a simplified conceptualization but the fact is that these two principal functions also function as useful analytical counterparts, especially when it comes to the context of the Directive on antitrust damages actions and its potential objectives. This is because the function of access to justice primarily serves the compensatory objective, whereas the objective of deterrence that improves overall enforcement is served primarily through internalization. These analytical counterparts are in no way mutually exclusive, but the question of which one of them is deemed as more important has a significant impact on what an ideal class action mechanism will look like. The right to compensation seems to be a primary goal in the Directive, but there are also different views on the part private actions for damages should play in regard to the overall enforcement of competition law. If focusing only on providing all victims with compensation, the access to justice function would be the most important. On the other hand, if there is an overall enforcement objective, also the internalization function will also need to be considered.

As Hodges points out, each legal system ‘creates a cost-benefit threshold’ for all legal proceedings. Under this threshold pursuing one’s claim is not worthwhile. For reasons of judi-

¹³¹ See Lindblom 1989, 25-27.

cial economy it is acceptable and reasonable that this threshold exists. The problem lies in a situation where small claims that fall under the cost benefit threshold is part of a harm dispersed so widely, that when aggregated it becomes a significant enough claim to justify a remedy.¹³² In situations where it for different reasons would be relevant to enable actions for these aggregated claims, introducing some kind of collective redress mechanism could be a relevant policy option. A remedy may be justified due to that a big group of victims should have the right to compensation, or that the disgorgement of the aggregated harm is relevant from an enforcement perspective. The need to ensure a necessary level of deterrence created by an action for the aggregated claims can also be seen as a justification.

Claims can be divided into the three following groups; individually recoverable, individually nonrecoverable and nonviable.¹³³ Individually recoverable claims are claims where, provided that the claim has been successful, the outcome of a proceeding will result in a net gain for the plaintiff. Nonviable claims are the claims that will have a negative net result even if they are aggregated into a collective proceeding. An individually nonrecoverable claim is a claim where the outcome of the individual proceeding will in all cases be negative. If aggregating individually nonrecoverable claims into a collective proceeding such as a class action, they become sustainable also from the point of view of procedural economy. This means, that if they are successfully collectively litigated, there is a net gain.¹³⁴ One of the functions of collective actions is hence to provide access to justice for individually nonrecoverable claims.¹³⁵

Aggregating multiple claims into one single proceeding spreads the fixed cost of litigation and creates economics of scale.¹³⁶ This is logically what creates access for justice in regard to individually nonrecoverable claims but economically it also creates productive efficiency, both from social and private points of view. The social efficiency is created as class actions enable courts to minimize costs when multiple proceedings are aggregated into a collective proceeding. From a private perspective, in addition to spreading fixed costs of litigation for claimants, the defendants will also be able to draw benefit from the econom-

¹³² Hodges 2008, 188.

¹³³ Lindblom 1989, 449-450. See also *Developments in the Law — Class Actions*, 1356.

¹³⁴ *ibid.*

¹³⁵ Individually recoverable and individually nonrecoverable claims are also sometimes referred too as marketable and unmarketable claims.

¹³⁶ Barker and Freyens, 14.

ics of scale created as the unit cost of each claimant can be minimized in a class action compared to several independent claims.¹³⁷ This of course is only true if some individually recoverable claims are included in the class action, as in theory, individually nonrecoverable claims will not be litigated at all if there does not exist a possibility for class actions.¹³⁸ Especially in this regard, as well as in general, it is important to note that all potential class actions do not necessarily consist of individually nonrecoverable claims.¹³⁹

Internalization of harm is the other principal function that is often used for justifying class actions. As noted in the previous chapter, especially in the US model private enforcement is a way to make undertakings internalize their external costs. This internalization of harm is intended to lead to compliant behavior. One of the logics legitimizing class action mechanisms is that through them the same allocative inefficiency can be addressed.¹⁴⁰ Posner, as a representative of the Chicago school, holds the view that from an economic standpoint the primary function of class actions is to force the defendant to bear the costs of the negative externalities of its behavior.¹⁴¹

The internalization approach explained above is also interesting from an antitrust enforcement perspective. The internalization approach is according to Wils, discussing optimal levels of fines, one that fits the optimal antitrust sanction model advocated by several Chicago school scholars. Following this internalization approach, when calculating sanctions, the social cost of the violation is taken into account instead of the expected gain of the violation, in order to deter only inefficient violations, as opposed to all violations.¹⁴² The internalization approach, according to Wils, is not a suitable one if the goal of antitrust enforcement is to go beyond ensuring efficiency, enabling consumer welfare and ensuring competitive structures on the market. This is due to that enforcement following the internalization approach it will not deter all violations.¹⁴³ It is almost needless to point out, that

¹³⁷ *ibid*, 14-15. See also Doriat-Duban, Ferey and Harnay, 34.

¹³⁸ See for example Silver, 208. See also Rosenberg, 263-268. As a representative of the school that sees the regulatory function of class actions to be the primary function, there is according to Rosenberg 'no empirical let alone analytical basis from distinguishing "small" from "high-stake" claims. Only class action aggregation ensures the opportunity for fully exploiting scale economies to motivate the optimal investment that maximizes net return — for the parties and society — from the adjudication of mass production cases.'

¹³⁹ Barker and Freyens, 17-18.

¹⁴⁰ Kanninen, Määttä and Rautio, 166.

¹⁴¹ Posner 2014, 803.

¹⁴² See Landes 1983, Posner 2014, 803.

¹⁴³ Wils 2008, 56-59.

both historically and at the present, the goals of antitrust enforcement in the EU go beyond the Chicago ideals of creating efficiency and deterring inefficient violations alone.¹⁴⁴

In a similar manner it can be discussed whether a class action instrument adopted only in order to make businesses internalize the harm of their behavior would be an instrument to create efficiency, rather than to provide corrective justice. It is however noteworthy that internalization will lead to a deterrent effect, and thus discourage potential future violations. Tightly associated with the internalization approach is what can be called regulation by litigation.¹⁴⁵ Rosenberg, who is a prominent advocate of this view, explains that overall social welfare is maximized by a class action regime that maximizes deterrence as it efficiently avoids accidents and violations that cause harm in the first place.¹⁴⁶ The regulatory goal of class actions is not dependent on how much compensation plaintiffs receive; compensation is mainly a tool for motivating plaintiffs to cooperate.¹⁴⁷ Rosenberg thus sees the compensation paid to victims to have an instrumental value in reaching the primary objective of creating welfare by preventing harm in the first place.

Different authors have given the above-mentioned functions different weight in their works. For example Lindblom, a very prominent advocate of introducing class actions into Swedish legislation, has approached class actions primarily from the perspective of access to justice.¹⁴⁸ In contrast, for example Posner and Rosenberg who were discussed above, are more focused on the regulatory effect that class actions have. This most likely and quite logically correlates with the fact that more ‘traditional’ legal authors will focus on access to justice, while authors in the field of law and economics will naturally focus more on internalization and efficiency.

The two principal functions discussed above can also be seen as an extension of the function of the civil procedure in general. According to Lindblom, civil procedure can be said to aim at ‘conflict resolution and compensation at an individual level and deterrence and moral building at the general level’.¹⁴⁹ Class action mechanisms can, as a matter of fact be seen as instruments increasing the possibility for the civil procedure to fulfill its own func-

¹⁴⁴ See for example Geradin, Layne-Farrar and Petit, 19-23.

¹⁴⁵ See for example Oker-Blom, 105.

¹⁴⁶ Rosenberg, 249-259.

¹⁴⁷ *ibid*, 283.

¹⁴⁸ See Lindblom 1989, 1-41, as well as Lindblom 2008, 32-47.

¹⁴⁹ Lindblom 2008, 172-173. See also Lindblom 1997, 9-10.

tions.¹⁵⁰ From the point of view of competition law follow-on actions for damages in the EU, it is central to note that in relation to these functions public enforcement already plays an important part when it comes to maximizing welfare through deterrence, and preventing future violations.

3.1.2 From Joint Cases to Class Actions

Going over different proposals, papers and other material discussing the possibilities for collective redress mechanisms in Europe it seems like the first issue to be addressed is always the necessity of avoiding the creation of a system that repeats the mistakes of US class actions. The scepticism towards collective redress mechanisms seems to a large extent to stem from a suspicion of the US system, as it is perceived to have led to a culture of abusive litigation and blackmail, as well as excessive contingency fees being awarded to greedy class counsels. Class actions in the US context¹⁵¹ are actions where the claims of an entire class of plaintiffs are aggregated, extending the courts jurisdiction to issue a judgment for claims that would normally not be covered by the courts jurisdiction.¹⁵² Class actions are initiated by what is called a lead plaintiff (or a group of them). Although so-called absent plaintiffs will be bound by a judicial decision, they usually have a procedural right to opt-out of the class.¹⁵³ Class actions can be used to seek both injunctive relief and compensation of harm.¹⁵⁴ In addition to the class action, there also exist other forms of group lawsuits that in contrast to the class actions are consensual – plaintiffs can themselves decide to enter into them or not.¹⁵⁵

In the US context, as well as in many other jurisdictions, the process of fulfilling the prerequisites of class actions is achieved through a process through which the court formally certifies the class action. Not all jurisdictions have the same formal certification process, although there usually exists prerequisites for a case to be eligible to be tried as a class action. Fulfilling these prerequisites can, for the purposes of this study be called certification.¹⁵⁶ The prerequisites for an American federal class action are established by rule 23(a) in the federal rules of civil procedure. Firstly, it is required that the class be so numerous

¹⁵⁰ Lindblom, 2008 176.

¹⁵¹ On federal level class actions are governed by rule 23 in the federal rules of civil procedure. As there might be more diversity regarding class actions on a state level, it is the model of class actions in accordance to rule 23 that are hereafter meant when referring to US class actions.

¹⁵² Silver, 196.

¹⁵³ *ibid*, 222.

¹⁵⁴ Weinstein, 172.

¹⁵⁵ Silver, 200.

¹⁵⁶ See Lindblom 2008, 322.

that a joinder of all members is impracticable, and that there be questions of law common to the class. It is also required that the claims and defences of the representative parties be typical of the claims or defences of the class, and that the representative parties will fairly and adequately protect the interests of the class¹⁵⁷. In addition, actions have to fit into at least one of the three types of class actions governed by rule 23 (b) and fulfil the respective prerequisites of the action in question. Out of these three types of actions, the so-called 23 b (3) actions often concern actions for damages and, antitrust cases make up an important category.¹⁵⁸ The prerequisites for certification of a 23 b (3) case are that the questions of law or fact common to class members predominate over any questions affecting only individual members (the predominance test), and that the class action is superior to other available methods for fair and efficient adjudication of the dispute (the superiority test).¹⁵⁹

In chapter 4 more examples will be provided of the different prerequisites that exist for the so-called certification of class actions. As the certification criterion in rule 23 already demonstrates, it is usually necessary for certification that the question of law is similar for the claims of all class members and that the class is sufficiently identifiable.¹⁶⁰

In addition to the American federal class action model there is an entire spectre of different kinds of actions that in some way aim to join or aggregate multiple claims because of procedural and economic benefits. Below, I with the help of classifications made by several authors, a brief categorization of different forms of collective actions that will benefit and serve the purposes of the continued discussion of the topic in this study is made.

Firstly there are models pursuing individual claims that have some ‘collective elements’ to them. A majority of the EU member states allow for some kind of joint cases in situations where there exists a legal link or common legal issue between several cases. Cases in these situations are often cumulated to a joint proceeding. These cases will, however, always remain as separate cases. Consequently, also the awarding of damages for claims made by different plaintiffs will be made separately.¹⁶¹ Joint claims do not themselves lower the

¹⁵⁷ Here both the lead plaintiff and class counsel are meant. Lindblom 1989, 191.

¹⁵⁸ Lindblom 1989, 127-128. See also the ABA Antitrust Class Actions Handbook, 174.

¹⁵⁹ See Lindblom 1989, 194-207, Silver, 197.

¹⁶⁰ For more examples see chapters 4.2, 4.3 and 4.4 as well as the table on page 60.

¹⁶¹ Keske, 40, Stadler, 202, see also the Ashurst report, 44 according to which all member states at the time allowed some kind of joint actions. Examples of national provisions can be found in for example the nearly identical provisions found in the Finnish Code of Judicial Procedure chapter 18, section 2 and the Swedish Code of Judicial Procedure chapter 14, section 1 according to which according to which actions at the same

cost-benefit threshold of proceedings, and are generally motivated by procedural economy aspects. Very close to joint cases are the so-called test cases where the decision given in an individual case serves as guidance to a multitude of other cases that are concerned with similar or equivalent issues. In most jurisdictions the outcome of the test case is usually not binding, but as a court has once solved the issue, a test case might lead to for example settlements for remaining claims.¹⁶² Test cases can have benefits in regard of procedural economy for the other cases, but do not have the same reparative effects.¹⁶³ Importantly, neither joint cases nor test cases aggregate multiple claims into one single proceeding to be brought in front of a court. In addition, neither has in the literature been seen to sufficiently address the obstacles to bringing claims that dispersed harm caused by antitrust violations usually face.¹⁶⁴ Importantly, though, their availability still acts as a valuable reminder of the fact that introducing a class action can not only be made for reasons of procedural economy only when it comes to cases where several similar claims are brought against the same defendant.

The US class action model described above is a model where claims are made on behalf of one or a few claimants for an entire class of claimants that usually have the option to opt out in order not to be bound by a judgment. Class actions can alternatively be opt-in class actions where claimants will need to take action in order to be included in the actions and bound by its outcome.¹⁶⁵ Representative actions are proceedings where a representative entity submits a claim on behalf of a collective of identified claimants.¹⁶⁶ Representative actions can be either opt-in or opt-out actions.

3.1.3 Opt-in or Opt-Out

The choice between opt-in and opt-out depend largely on the purpose a class action is supposed to serve. Both models have a number of characteristics that can be either desirable or unwanted, depending on the objectives of introducing a class action instrument. Firstly, a significant difference between opt-in and opt-out is, as for example Mulheron has demonstrated by comparing empiric data, that opt-out regimes systematically lead to a higher

time brought by several plaintiffs against one or several respondents shall be heard in the same proceedings, if they are essentially based on the same grounds.

¹⁶² Stadler, 202.

¹⁶³ Lindblom 2008, 187.

¹⁶⁴ Keske 41, Stadler, 202.

¹⁶⁵ A good example is the Swedish model of individual class actions, described in chapter 4.3.1.

¹⁶⁶ Keske, 42-43.

degree of participation that opt-in regimes.¹⁶⁷ It has also been pointed out that opt-in regimes will very likely automatically lead to lower participation because of the behavioural status quo bias which makes the choice of default essential in regard to participation.¹⁶⁸ For opt-in regimes, there will also inevitably be transaction costs for trying to reach the potential claimants. Critics of opt-out regimes however find them to undermine the autonomy of claimants.¹⁶⁹

Secondly, the choice between of opt-in or opt-out also relates to the functions of class actions, in regard to how compensation will be distributed between class members. In opt-out class actions, there is a possibility that the awarded damages remain unclaimed by the so-called absent plaintiffs. The so-called fluid-recovery or cy-pres mechanisms have often been applied to these situations. They mean that the awarded damages left unclaimed are distributed for example through a so-called price mechanism, or through a fund with a beneficiary purpose. These kinds of mechanisms do not serve the purposes of the access to justice function that aims to compensate victims for their harm.¹⁷⁰ On the other hand, it has been suggested that when the internalization function is to be served, the fact that all class members will not be compensated is not an obstacle as the fluid-recovery and cy-pres mechanisms can be used, and the social objective of creating deterrence will be achieved.¹⁷¹

3.1.4 The Costs and Risks of Class Actions

Although aggregating multiple claims into one collective action creates economics of scale, and lowers the cost per unit of litigation for both claimants and defendants, the fact remains that litigation always comes at a certain cost, and bears a certain risk. This risk is of course also dependent on the cost-shifting rules applicable in the jurisdiction in which the proceedings take place.

In general it is the claimant that brings actions (what above when describing US class actions was called the lead-plaintiff) that will be responsible for the costs and risks of the proceedings. As already seen above, a difference can be made between claimant initiated class actions and representative actions. In claimant-initiated class actions the risk-bearer

¹⁶⁷ Mulheron 2008a 147-156, see also Mulheron 2008b 431-434.

¹⁶⁸ Sibony, 51-57.

¹⁶⁹ See for example Sorabji, 538 see also Higgins and Zuckerman, 21-31.

¹⁷⁰ Lindblom 1989, 280-281. See also Keske, 184 and Sorabji, 531-537.

¹⁷¹ Silver, 209.

enforces his or her own rights when making a collective claim. In the latter category, it is often parties not enforcing their own rights who initiate actions and carry the risks of litigation.¹⁷² It is essential to point out that in general, the class members are usually not responsible for any of the risks or costs associated with the proceedings.¹⁷³

In this context also the widely criticized US system of contingency fees step in. In the US it is not uncommon that lawyers are seen as a kind of entrepreneurs that seek class actions on their market.¹⁷⁴ The incentive for picking meritorious claims to litigate is the contingency fee that will usually award the class counsel 20-40 % of the total class award if the class action is successful.¹⁷⁵ This has naturally been criticized for leaving claimants with less compensation. Contingency fee arrangements are usually also associated with the rule that an unsuccessful action will mean no fee.¹⁷⁶ This means that the risk of losing is shifted on lawyers, which will also in theory incentivize them to decline weak cases.¹⁷⁷ From a European context these kinds of contingency fee arrangements are not always feasible as their use can be restricted, or even totally prohibited in some cases.¹⁷⁸ However, a less uncompromising version of the contingency fee can be said to be the so-called conditional fees that usually mean that the result of the action will have some impact on the class counsel's fee, although part of it will be determined by the hourly fee system usually used for lawyers in Europe.¹⁷⁹ With these kinds of contingency arrangements or conditional arrangements, part of the risk of litigation is shifted on the lawyers. The American law and economics view takes this to mean also that these kind of arrangements incentivizes the lawyer to reach a result that is beneficial for the class, as the lawyer through maximizing his or her attempts to claim a maximally large compensation as possible, also maximize his or her own benefit as well.¹⁸⁰

¹⁷² See for example the Swedish models of organizational or public class action in chapter 4.3.1.

¹⁷³ This will be seen in the presentation of different class action models throughout this study.

¹⁷⁴ For a further account on the economic rationale of contingency fees, see for example Posner 2014, 801.

¹⁷⁵ Silver, 200.

¹⁷⁶ Keske, 47.

¹⁷⁷ Posner 2014, 802.

¹⁷⁸ For example the CCBE code of conduct, article 3.3 forbids contingency fee arrangements unless they are in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

¹⁷⁹ Keske, 47.

¹⁸⁰ See for example Silver, 211.

3.1.5 Awarding and Distribution of Damages in Class Actions

An important aspect of class actions is that they, as opposed to joint actions, aggregate all claims into one common proceeding. Although a class of claimants would have claims based on the same or a similar question of law, one cannot always be sure that their claims would be identical in regard to for example size.¹⁸¹ Damages can be established by calculating an aggregate amount of damages for the entire class.¹⁸² In these cases, the distribution of damages will sometimes take place after the conclusion of the actual proceedings. Cases might also be settled or arbitrated in a manner that determines the individual recovery with a damage-averaging rule, awarding an average per capita amount.¹⁸³ If claims are very heterogeneous in actions where a for example damage-averaging rule is used, claimants with larger individually recoverable stakes might opt-out or choose to not opt-in which may become a problem.¹⁸⁴

It is also possible to use class action models where individual claims are individually tried. The common question of law in the class actions can of course concern the existence of a liability for damages and after this has been established, the amount of individual claims can be assessed individually. This model can however lead to individually irrecoverable claims becoming individually irrecoverable also within class actions, as the cost of litigation will of course rise accordingly.¹⁸⁵

3.2 Compensation or Regulation

3.2.1 The Developing Approach of the European Commission

As already discussed, class actions can be seen to have a dual function. They both provide access to justice and courts, and create as a mechanism that creates deterrence by the internalization of harm. Despite this dual function of class actions, it is not at all certain that a class action instrument can always pursue and fulfill both these functions equally at the same time. For example, not all scholars view the compensatory function of the federal US class action model as equally important to the function of internalization and deterrence-creation.¹⁸⁶

¹⁸¹ Lindblom 1989, 274.

¹⁸² *ibid*, 276.

¹⁸³ Barker and Freyens, 25.

¹⁸⁴ *ibid*.

¹⁸⁵ Lindblom 1989, 274-275.

¹⁸⁶ See text to n 141 and n 147.

As already mentioned in chapter 2, the introduction of a collective redress mechanism was on the Commission's agenda in the process leading up to the Directive on antitrust damages actions, but it was eventually dropped from the Commission's Directive proposal¹⁸⁷ with a cross-sectorial recommendation given as a kind of substitute.

In the previous chapter the role of private enforcement as a means to attain public policy goals was discussed. Similarly, it seems like the approach chosen by the commission to introduce collective redress mechanisms in Europe was initially largely motivated by an objective to serve a regulatory goal rather than providing access to justice as the ultimate objective. Hodges points out that it was originally DG COMP and DG SANCO that initiated the overall discussion on collective redress. DG Justice became involved in 2007, and in this sense collective redress did not originate in the overall agenda of the work of DG Justice on civil procedure.¹⁸⁸ According to Hodges, collective redress is largely perceived as an economic tool with regulatory purposes, rather than a social tool with redistributive social purposes. From legal literature it becomes evident that just as with enhancing private enforcement in general, the plans of the commission to introduce collective redress are seen as a way to ensure the efficiency of EU law.¹⁸⁹ Competitiveness being a leading political priority, collective redress becomes a regulatory tool serving the purposes of the internal market.¹⁹⁰ According to the White paper 2008 that proposed the introduction of two models of collective redress, full compensation was supposed to be the leading principle. However, there is no straightforward proof that providing full compensation would (at least in a cost-efficient way) lead to the achievement of the regulatory goal of competitiveness in the internal market. In this sense there seems to exist yet again a slight conflict between the stated purposes of facilitated private enforcement and the tools proposed.

The Commission recommendation on collective redress mechanisms outlines potential 'common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of right granted under Union Law'. From this it follows that the recommendation is not sectorally restricted to competition law, but applies also to other sectors of EU law.¹⁹¹ In the recommendation redress mechanisms are explicit-

¹⁸⁷ Commission Proposal 2013, 12.

¹⁸⁸ Hodges 2008, 184.

¹⁸⁹ Wikberg, 228-229.

¹⁹⁰ Hodges 2008, 192.

¹⁹¹ Recital 7 mentions consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection as areas where collective redress 'is of value as supplementary private enforcement'.

ly seen as playing a part as mechanisms for enabling access to justice and compensation.¹⁹² The recommendation, however, also points out the function of collective redress mechanisms being ‘prevent and stop unlawful practices’.¹⁹³

According to the recommendation, member states should enable representative actions by especially designated representative entities with a non-profit character. The standing of these entities should, according to the Commission, be based on clearly defined conditions of eligibility. The objectives of these entities should have a direct relationship with the right granted under EU law that the entities would enforce. These entities should also have sufficient capacity in regard to financial resources and human resources, as well as legal expertise, to be able to represent multiple claimants and act in their best interest.¹⁹⁴ According to the recommendation, the entities should be designated in advance, or certified by national courts on an ad-hoc basis.¹⁹⁵ The Commission also recommends that public entities should be empowered as representative entities.¹⁹⁶

In this context it is also interesting thing to note is that the recommendation explicitly states that as a general rule collective redress actions should only start as follow-on actions.¹⁹⁷ In other words, the Commission clearly does not see it as desirable that ‘private attorney generals’ use collective redress mechanisms to pursue stand-alone actions that may have escaped the public enforcement machinery. Despite of this, it seems that just as with the Directive on antitrust damages actions, there is under the cover of the full compensation objective a discrete underlying enforcement aim with wanting to introduce collective redress mechanisms for the violation of EU law.

3.2.2 Class Actions and Private Enforcement of Competition Law

According to Sullivan and Rosenberg who speak from the US context, follow-on class actions rarely contribute to the enforcement in any way other than by adding on to the existing public sanction. These damages are therefore not necessarily relevant from a deterrence perspective, and may lead to overenforcement, especially because of the treble damages awarded in the US.¹⁹⁸ In the EU context, if fines that have been issued by the preced-

¹⁹² Commission Recommendation 2013, para 1.

¹⁹³ *ibid*, recital 9.

¹⁹⁴ *ibid*, para 4.

¹⁹⁵ *ibid*, para 6.

¹⁹⁶ *ibid*, para 7.

¹⁹⁷ *ibid* para 33.

¹⁹⁸ Rosenberg and Sullivan, 161. See n 65 for a diverging view on the effect of treble damages.

ing public enforcement have already automatically led to a disgorgement of the unjust enrichment of the violator and created sufficient deterrence, the only role left for private class actions, is the role of compensating victims. On the other-hand, if the goal of private enforcement is mainly compensatory it is necessarily not a problem that there is no ‘added value’ to deterrence, especially since it from reading the Commission Recommendation 2013 it seems that the commission in general does not see collective stand-alone actions as especially desirable. Still it is noteworthy that this could in some situations lead to a ‘double-disgorgement’ of the unjust enrichment of the violator as well as to deterrence being produced a cost higher than necessary.

It cannot be automatically assumed, obviously, that the unjust enrichment of a violator always corresponds exactly to the harm caused to victims.¹⁹⁹ However, the counterfactual scenario that damages actions is based on, where for example the overcharge of a cartel is used to quantify damages, is a good example of the connection between the unjust enrichment and the harm to be compensated.²⁰⁰ Of course the disgorgement of unjust enrichment and compensation does not always correspond to the same amount, firstly because of the complexity of calculating these damages, entailing both actual loss and lost profit. Secondly, and even more importantly, it has to be noted that the compensation allowed for under both the Directive and case law will in many cases go beyond the restitution of the unjust enrichment of the violator.²⁰¹

As seen in chapter 2.1.1, Wils has held that one of the objectives of competition law is the clarification of the law and its prohibitions. In a field such as competition law where development is always on going, this is an important task. In this sense the decentralized enforcement of EU competition rules is also a challenge. From the point of view of private enforcement there is also a possibility of multiple simultaneous proceedings, possibly even multiple simultaneous proceedings taking place in different jurisdictions. This, however, creates a risk of contradictory judicial decisions. In this sense it can be pointed out that

¹⁹⁹ See for example Lindblom 1989, 272.

²⁰⁰ See for example Oxera study, 12.

²⁰¹ See Opinion of AG Kokott in *Kone*, para 78. According to AG Kokott: ‘A claim for compensation is primarily concerned not with recovering from the injuring party the excess that has accrued to him but with awarding to the injured party reparation for the loss he has suffered as a result of the injuring party’s unlawful conduct.’

collective redress could potentially function as a relative safeguard to ensure consistency compared to multiple proceedings.²⁰²

The current discussion regarding compensation or deterrence becomes a bit superfluous in the sense Lindblom, for example, has pointed out that class actions might actually be the only tool that can play a compensatory part in regard to individually nonrecoverable claims.²⁰³ The development of antitrust actions for damages has both through case law and the policy choices made and consequently found in the Directive on antitrust damages actions, led to claimable harm in many cases being widely dispersed and pulverized. This also makes collective actions the only way to go forward if there is a genuine objective of providing compensation to all harmed victims. Although the enforcement and deterrence approach be the primary policy goal of a collective enforcement instrument, the compensation created as a ‘side-product’ could for many groups of victims be the only way to obtain even some compensation. The dichotomy between compensation and regulation is equivalent to the dichotomy between compensation and deterrence: when attempting to achieve one, also the other will be produced to some extent.

In line with the conclusions made in chapter 2.1.2, the outcome in regard to whether a collective redress mechanism will enhance the effectiveness of EU competition law depends on what is understood as effectiveness. If it is to be understood as effective enforcement, whether collective redress can fulfill the different functions of antitrust enforcement must be taken into consideration. To repeat what was discussed in chapter 2.1.1, deterrence, but also clarifying the law and providing compensation for victims of violations are both important functions of antitrust enforcement.²⁰⁴ As discussed throughout this main chapter, class actions have the potential to fulfill all of these functions. The Directive on antitrust damages actions has an objective of providing full compensation, and simultaneously it seems like the deterrent part of antitrust enforcement is for now mainly commissioned to public enforcement. This leads to that the desirable primary objective a potential class actions mechanism should have being providing compensation. The problem is perhaps that a well-functioning system of collective redress with a compensatory objective (as well as the Directive’s notion of full compensation) creates additional deterrence as a side effect. De-

²⁰² See for example Doriat-Duban, Ferey and Harnay, 33.

²⁰³ Lindblom 1989, 269.

²⁰⁴ See chapter 2.1.1.

terrence created as a side effect can be, but is not always necessarily desirable. This will be discussed further in chapter 5.4.

If ‘effectiveness’ is understood as effective judicial protection, it has to be highlighted that for individually irrecoverable claims collective redress is perhaps the only way to achieve judicial protection. The decisive factor, both in regard to effective enforcement and effective judicial protection, is how such a system can be implemented so that its costs are proportionate in regard to its objectives.

4. Three Examples of Class Actions in EU Member States

4.1 Collective Redress in EU Member States

As already mentioned in previous chapters, the issue of including a class action instrument in the Directive on antitrust damages actions has been a politically sensitive one. The skepticism towards class actions does, however, not mean that there be no class actions instruments in member states. A 2012 study commissioned by the European Parliament found that there are some kind of collective redress mechanisms in all member states except for Belgium, Cyprus, Czech Republic, Estonia, Latvia, Luxemburg, Slovakia and Slovenia. According to the study, an opt-in model has been adopted in a majority of the member states where class actions are in use.²⁰⁵

The following sub-chapters will examine the collective redress and class action instruments available in Finland, Sweden and The United Kingdom. The background and rationale for the introduction of the mechanisms, their use in general, and in antitrust damages actions in particular, will be examined. At the same time, the chapters on Finland and the United Kingdom will examine some examples of actions having been brought more or less collectively even though no class action instrument has been available. These examples partly illustrate the need for collective procedural options, but also the insufficiency of traditional joinder devices.

4.2 Finland

4.2.1 The 2007 Act on Class Actions: Several Attempts, Long Preparations, Few Results

In Finland, preparations to introduce a class action mechanism commenced in the early 1990's. After roughly three failed attempts to introduce a collective redress instrument, the Act on Class Actions (Ryhmäkannelaki) was introduced in the Finnish legislation in 2007.²⁰⁶ The scope of the Act on Class Actions limits its application to civil actions between consumers and businesses. Civil cases concerning the conduct of an issuer of securities or the offeror in a takeover bid or a mandatory bid are explicitly excluded from the scope of the Act.

²⁰⁵ Collective Redress in Antitrust, p. 19-20. Note that Croatia was not yet a EU member state at this point of time.

²⁰⁶ Välimäki, 3.

The prerequisites for a class action are defined in section 2 of the Act on Class Actions. Firstly, it is required that several individuals have claims towards the same defendant, and that they are based on the same or similar grounds. Secondly, the hearing of the case should be expedient in view of size of the class, the subject matter of the claims, as well as the evidence presented. Thirdly, the class should be identified with adequate precision. The Finnish class action model can be classified as a kind of a public representative action because it is only the Consumer Ombudsman that has standing to bring a claim on behalf of an identified consumer collective.²⁰⁷ According to section 4 of the Act, the Consumer Ombudsman acts as a plaintiff and is also the party with the right to speak in the proceedings. The Act on Class Actions adopts an opt-in model, as a party eligible for membership in the class will need join the action by a written and signed letter of accession to the Consumer Ombudsman.

Taking into regard the scope of the Act on Class Actions, the Act could very well be used for initiating proceedings in order to compensate consumers harmed by competition infringements. For example, a case where a cartel would have fixed prices on the retail market, and by doing so directly inflicted harm on consumers, could probably easily be fitted within the scope of a consumer-business dispute. At the same time, it is almost needless to say that a lot of potential competition law claims are of course left out of the act's scope. According to Välimäki the instrument is designed for compensatory justice and safeguarding the interests of individuals.²⁰⁸ It is also worthwhile to note that the preparatory works asserts that one of the objectives for the act is to improve the possibilities of big collectives of harmed individuals to make claims.²⁰⁹ Following this, the instrument formally seems ideal for providing consumers with compensation following competition law infringements. However, the Consumer Ombudsman has not once used the right to initiate actions on behalf of a consumer collective since the Act on Class Actions has entered into force.

That there have been no class actions although there is an existing mechanism has often been attributed to the exclusive standing of the Consumer Ombudsman.²¹⁰ In this context the financing of the proceedings also plays a part. The Consumer Ombudsman is attached to the Finnish Competition and Consumer Authority and the introduction of a collective redress mechanism with the Consumer Ombudsman as the exclusive plaintiff did not in-

²⁰⁷ See also HE 154/2006, 1 that characterizes the instrument as an authority initiated, public class action.

²⁰⁸ Välimäki, 5.

²⁰⁹ HE 154/2006, 27.

²¹⁰ Pråhl and Puhakka, 684.

crease the budgetary allowances of the agency. A class action will in other words also be dependent on internal budgetary considerations of the Finnish Competition and Consumer authority.²¹¹ In reality the extent to which this model of a public class action instrument serves as a compensatory tool, or a tool through which individuals will be able to enforce their own rights and interests is thus questionable. With regular intervals, the consumer ombudsman has announced intentions to possibly launch a class action towards different businesses.²¹² Consequently, a common defence of the current mechanism against its shortcomings is that clearly it serves a deterrent purpose.²¹³ In cases of competition law infringements that have caused consumers harm, this kind of deterrence is not very likely to serve consumers any additional redress or compensation. It could perhaps lead to settlements where violators would consensually agree to provide compensation, but it feels more likely that this would not become a systematic practice. In addition, this kind of deterrence must be seen as quite irrelevant from the point of view of deterring potential violators of competition law as it does not necessarily correspond to creating the kind of optimal deterrence that was discussed in chapter 2.1.1. A need to reform the current Act on Class Actions has been acknowledged for example in the reform program for the judiciary, in which assessing the possibilities of expanding the scope of class actions has been outlined as a medium-term goal.²¹⁴

Going back to the context of compensating consumers that have suffered harm following competition law infringements, it is worth to note that the working group in charge of preparing the implementation of the Directive on antitrust damages actions does not in any way assess the functioning of the existing instrument in regard to the Directive and antitrust damages actions in general. In fact, the report of the working group merely notes that the Directive does not require member states to introduce collective redress mechanisms.²¹⁵

4.2.1 Other Initiatives to Join and Aggregate Competition Law Claims

The previous sub-chapter described the Finnish, very narrowly applicable class action model that in practice has not been used, although it in principle is applicable to competi-

²¹¹ Aamulehti 9.7.2012: *Ryhmäkanteita ei nosteta - Kuluttajavirasto pelkää isoja oikeudenkäyntikuluja*, see also Viitanen, 218.

²¹² A recent example concerned price increases of the energy company Caruna: see YLE 8.2.2016: *Carunan rajut hinnankorotukset voivat poikia Suomen ensimmäisen ryhmäkanteen*.

²¹³ Edilex 2.7.2008, *Ryhmäkannelakia ei toistaiseksi ole tarvittu kuin enintään pelotteeksi*.

²¹⁴ Reform program for the judiciary 2013-2025, 37.

²¹⁵ TEM 46/2015 2015, 42.

tion law claims when they concern consumers. Interestingly, despite of missing formal structures, Finland has as a matter of fact seen quite a few bold attempts to initiate some kind of collective actions in the field of competition law actions.

Already in the mid 1990's there was an interesting case which in some ways could be seen as a representative action, where an association of entrepreneurs called Suomen Yrittäjien Keskusliitto brought actions on behalf of its members.²¹⁶ Several businesses transferred their claims to the association which then brought actions and claimed the aggregate amount of all the businesses' claims. The claims were based on claiming back unjust enrichment that according to the claimants been caused due to the excessive price of electricity, a conduct that the Finnish NCA had found to constitute abuse of dominance. Although the claim did not succeed, neither in the district court nor in the court of appeals²¹⁷, the transfer of the claimants' rights to the association was, despite of arguments brought by the defendant, accepted by the district court. In Finnish legal literature it is held that these kind of cases with industry associations acting as claimants on behalf of their member businesses could be a feasible way of joining claims.²¹⁸

The same technique of transferring rights to claims has later on been utilized, or it can even be suggested, been made a business model by the Cartel Damages Claims Company (CDC).²¹⁹ Following the Commission decision on a hydrogen peroxide cartel²²⁰, CDC purchased the claims of two companies affected by the cartel, and filed claims against one of the cartel participants, Kemira. The arguments of Kemira, stating that CDC did not have the right to act as a proper party in the proceedings, were dismissed by an interlocutory judgment the Helsinki district court.²²¹ The case was later settled out of court.²²² As the original claims amounted to 90 million euros, and were purchased from only two claimants, this case did not concern aggregating individually irrecoverable claims. The degree to which so-called claimant vehicles are in general interested in purchasing individually irrecoverable claims can be speculated. In regard to the objectives of the Directive, it is however very likely that the original claimants rights to full compensation will be compro-

²¹⁶ Tampereen Käräjäoikeus, tuomio 251 §, dnro S 93/91.

²¹⁷ Turun Hovioikeus, tuomio 2797, dnro S 95/357.

²¹⁸ Havu, Kalliokoski and Wikberg, 134.

²¹⁹ See www.carteldamagesclaims.com. According to information on the website, the company also operates with the same business model in other member states.

²²⁰ See Commission decision in *Hydrogen Peroxide and Perborate*.

²²¹ Helsingin Käräjäoikeus, välituomio 36492, dnro 11/16750.

²²² See for example Kemira Stock Exchange release 19.5.2014: *Kemira Oyj achieves a settlement with CDC in the damage claim litigation in Helsinki, Finland*.

misled in cases where claims are bought by claimant vehicles such as CDC. On the other hand, the original claimants have made a conscious choice to give up part of their compensation, probably also on the grounds of a rationale that includes economic considerations. In many ways these kinds of actions can be compared to class actions where the risk is mainly carried by the class counsel working with a contingency fee arrangement.²²³ In this regard the fear of US-style over-litigiousness because of class actions can be criticized, as parts of the feared phenomena have already appeared in the EU without any supporting formal structures.

The last highly interesting example of collective actions brought without any formal legal structure is the follow-on claims to the Finnish wood cartel, already briefly mentioned in chapter 2.3. Following a judgment of the Market Court, Metsäliitto and Stora Enso, two major wood companies were issued fines for participating in a cartel lasting from 1997 to 2004. Metsäliitto was fined 21 million euros and Stora Enso 30 million euros. The third cartel participant, UPM was not issued fines as it had revealed the cartel by its leniency application.²²⁴ As already mentioned, potential victims that sold wood to the infringing undertakings within this time period has been estimated to be up to 400 000 forest owners.²²⁵

Interestingly, following the initiative of an individual, a kind of a collective action for the suppliers of the wood cartel was initiated. The forest owners could sign up to join their own claims in the actions through a website. By signing up the forest owners authorized the initiator of these collective proceedings to act on their behalf, and the claims were then collectively brought with a common counsel for all cases. According to information on the website, there was a fixed cost of around 2000 euros to be paid by all participating claimants.²²⁶ To deal with the numerous claims, joinder devices described in chapter 3.1.2 were used by the Helsinki district court. To decide upon a dispute concerning the limitation period for bringing actions, the Helsinki district court tried 13 test cases out of the 650 initial-

²²³ According to information in the interlocutory judgment of the district court, the final purchase price of the claims would be determined by the outcome of proceedings. See also Havu, Kalliokoski and Wikberg, 26 according to which 25-30 % of the amount awarded are left as fees for the claimant vehicle company.

²²⁴ MAO:614/09.

²²⁵ Viitala, 416. It is worth to note that there are other potential victims than the suppliers of wood. See for example Viitala, 411 in which it is mentioned that the value of forest estate sold at this time has been affected by the cartel, as the prices are determined inter alia with the help of wood prices. In other words the cartel might have caused significant damages also by umbrella pricing.

²²⁶ www.suurisavotta.fi.

ly brought cases.²²⁷ These were appealed to the Helsinki Court of Appeals and subsequently to the Supreme Court²²⁸. After the Helsinki Court of Appeals judgment on the limitation period, 1000 more claims have been brought.²²⁹ The case demonstrates how courts can use traditional joinder devices to ensure procedural economy when a big amount of similar claims are brought simultaneously. From the point of view of claimants it however seems unclear, who for example carries the ultimate risk in regard to costs. A more formal system of collective redress with clear rules would provide more security for claimants.

4.3. Sweden

4.3.1 The Broad Scope of the Swedish Group Proceedings Act

Sweden started on its path towards a collective redress mechanism approximately at the same time as Finland.²³⁰ Achieving a result, however, was faster in Sweden where the Group Proceedings Act (*Lag om grupprättegång*) entered into force already in 2003.

Section 8 of the Act establishes the special procedural requirements for claims to be brought as class actions. Firstly, an action is required to be based on circumstances that are common or similar for the claims of all class members. Secondly, the action should not be unsuited as a class action because the grounds of the claims of some class members differ significantly from the grounds of other class members. Thirdly, it is required that the majority of the claims in the class action not be just as well be brought as individual claims by class members themselves. Fourthly, the group should be sufficiently identified in regard to size, scope and general conditions. As a last special procedural requirement for a class action, section 8 requires that the lead plaintiff be, in regard to his or her own interests and economic prerequisites, suited to bringing a class action as well as in general acting on behalf of the class.

The Swedish collective redress model is significantly broader in its scope than its Finnish equivalent. Firstly, it is not only limited to consumer-business disputes. Secondly, it also takes a broader approach in regard to standing. Section 1 of the act sets out that an action can be initiated as a individual class action, a representative class action or a public class

²²⁷ Edilex, 28.3.2014: *Käräjäoikeus hylkäsi äänestäen ensimmäiset kanteet metsäkartelliasiaassa vanhentuneina – metsänomistajat tyrmistyivät.*

²²⁸ One of these thirteen cases have so far been given a retrial permit and been tried, see KKO:2016:11 and Supreme Court press release 29.2.2016: *Puukartelliasia palautettiin Helsingin käräjäoikeuden käsiteltäväksi.*

²²⁹ YLE 2.1.2015: *1 058 kannetta ja 24 000 liuskaa paperia – Metsäkartelli työllistää Helsingin käräjäoikeutta.*

²³⁰ Lindblom 2008, 91.

action. According to the preparatory works, combining these three forms was estimated to be the most efficient way of combining the functions of reparation, prevention, clarifying substantive law, and procedural economy.²³¹

Any individual with claims representing a broader group of claimants can initiate individual class actions. This is the only form of class action where the claimants is as a matter of fact seeking the enforcement of his or her rights and interests.²³² The representative action allows for a non-profit association that in accordance to its statutes acts for the interest of consumers or employees to bring a representative class action. Representative actions can be brought in disputes between consumers and businesses regarding products, services or other utilities offered by the business in question. Also other types of claims can be included if there are benefits to including them into the proceedings. The principal claim must however relate to a consumer complaint fitting the description above.²³³

An authority that, taking into account the claim in question, is suitable to represent the class can bring a public class action. The Group Proceedings Act specifies that the government will further define the authorities entitled to bring public class actions. So far, only the Consumer Ombudsman has been given this right. The background motive allowing for these types of public class actions was that they could be used when there is a need for a directive function, or setting precedent and clarifying substantive law.²³⁴ The preparatory works specify that public class actions should in general only be brought when it is assumed a specific or representative class action will not be brought and there is a special public interest to initiate a class action.²³⁵ The Consumer Ombudsman has been given the right to bring public class actions in disputes between consumers and businesses if it is motivated from ‘a public perspective’.²³⁶

The Group Proceedings Act has to a certain extent accepted the use of conditional fees. Section 38 of the act establishes that an agreement on conditional fees is only enforceable if a court has accepted it. Section 39 establishes that the fee cannot be solely based on the value of the dispute in question, and that it has to be fair and just in regard to the character of the group proceeding.

²³¹ Prop 2001/02:107, 37.

²³² *ibid*, 38.

²³³ Lindblom 2008, 313.

²³⁴ Prop 2001/02:107, 37.

²³⁵ *ibid*, 54.

²³⁶ Förordning (1995:868) med instruktion för Konsumentverket.

In 2008 an evaluation of the Swedish Group Proceedings Act was made. Up to then, 10 cases had been brought to courts as class actions. From these the majority were individual class actions, while there was one public class action and no representative action.²³⁷ According to Lindblom, many of these cases have enabled claimants that would otherwise not have received any redress to be compensated.²³⁸ Importantly, at least three actions between the introduction of the law and 2008 have used conditional fees as a mean of financing.²³⁹ A widely known class action was the Skandia case in which claimants founded a non-profit association that brought the action to a court. The non-profit association got standing by that a claim was transferred to it by one of the claimants. The class represented was individuals with life insurance savings in Skandia Liv.²⁴⁰ Funds for the proceedings were according to the association itself secured by that all 15 000 members of the association paid at least a 150 SEK membership fee.²⁴¹

4.3.2 The Swedish Class Action Model and Competition Law Damages Actions

Also before the Directive on antitrust damages actions it has been possible to bring an individual or representative class action for competition law damages. This also applies for public class actions in cases where the consumer ombudsman would have the right to bring claims.²⁴² No class actions for competition law damages have however yet been brought in Sweden.²⁴³ This fact can also be considered in the light of the fact that Sweden quite early, already in 1993, introduced provisions for claiming antitrust damages in to the national legislation. Although the scope of this provision was expanded and the legal rule clarified in 2005, there have also in general been very few successful claims for actions for damages following antitrust infringements in Sweden.²⁴⁴ Another linked aspect that can be pointed out is that discussion has taken place whether the Swedish NCA should be given the right to bring public class actions. It seems however that this idea was abandoned, as it was per-

²³⁷ Evaluation of the Group Proceedings Act, 211-247. See also Lindblom 2008, 255. Note, in regard to the non existing representative actions, that in the case Skandia an individual class action was brought by a special non-profit association set up by claimants. Note also, that in some of these 10 cases a settlement was reached, while the court in some concluded that the actions did not fulfill the special procedural requirements for class actions. This is especially relevant for what will be discussed in chapter 5.6, where it is pointed out that a significant number of class actions are settled.

²³⁸ Lindblom 2008, 265.

²³⁹ *ibid*, 255.

²⁴⁰ Evaluation of the Group Proceedings Act, 212. See Lindblom 2005, 157 to note the interesting detail that the association chose to within the framework of the Swedish Group Proceedings Act bring an individual action and not a representative action.

²⁴¹ *ibid* 213.

²⁴² Lindblom 2008, 297.

²⁴³ Henriksson, 63.

²⁴⁴ Bernitz, 506.

ceived that ensuring well-functioning public enforcement should be the main priority of the NCA.²⁴⁵

In relation to the national implementation of the Directive on antitrust damages actions, there is also one proposed reform that also amends the Group Proceedings Act. The memorandum prepared by the Swedish ministry on enterprise and innovation proposes that all antitrust damages actions, including potential class actions, would be concentrated to a special patent and market court.²⁴⁶ Although this is a reform that is in no way required by the Directive, it is interesting to note that the choice of concentrating proceedings into one specialized court has been made.

4.4 The United Kingdom

4.4.1 Collective Actions in the Civil Procedure Rules

Contrary to popular belief, the genesis of class actions did not take place in the United States but actually in 17th century England.²⁴⁷ Although the modern version of the class action is in first hand attributable to the US, class actions have in the last decades been revived also in their original birthplace. It seems like the UK with its national efforts has tried to keep a steady, in some cases even quicker pace with the EU in enabling actions for damages in antitrust cases. These reforms have also included introducing collective-redress instruments. What is interesting is that there exist both general procedural rules on group litigation and a specific sectorial class actions instrument for private enforcement in the field of competition law.

The general procedural rules, applicable in England and Wales, are found in the Civil Procedure Rules (CPR). The CPR contains ‘two pillars’ for multi-party litigation. The first one, found in rule 19.11 of the CPR is the possibility of coordinating multiple claims with a so-called group litigation order, often referred to as GLO. The GLO can apply to any type of claims that give rise to common or related issues or facts of law. A judgment that is made under a GLO will be binding on all parties but it is however important to note that for a GLO, all claimants need to initiate their own proceedings²⁴⁸ although some of the

²⁴⁵ Evaluation of the Group Proceedings Act, 183, Henriksson, 62-63.

²⁴⁶ Konkurrensskadelag, 78-81.

²⁴⁷ For a more detailed account, see for example Lindblom 1989, 64-108.

²⁴⁸ CPR 19B, para 6.1A, see also Mulheron 2005a, 49. See also Higgins and Zuckerman, 13 according to whom this was one of the reasons to why the Emerald case that will be discussed below was not brought as a GLO.

‘ordinary formalities’ for bringing claims are avoided through the GLO procedure²⁴⁹. GLO seems to land somewhere between joint actions and class actions and has for example been described to be ‘no more than a sophisticated opt-in case management mechanism for unitary claims that share a common or similar issue of law or fact’.²⁵⁰

The second pillar is the so-called ‘representative rule’, found in Rule 19.6 of the CPR. The representative rule makes it possible for a single claimant to represent all parties with ‘the same interest’. The judgment will be binding for all parties represented in the claims. Hence, the requirement for the representative rule is numerous claimants all having the same interest.²⁵¹ This rule has been sparsely used, mainly because of the strict interpretation the courts have given the requirement of ‘same interest’.²⁵²

The case *Emerald* was a failed attempt to bring an antitrust damages action under the representative rule, primarily because of the strict interpretation of the notion of ‘same interest’. Following the investigation of the Commission regarding the involvement of British Airways (BA) in a at that time suspected air freight cartel²⁵³, flower importing company *Emerald* appointed itself as the representative of a group of direct and indirect purchasers of air freight services. According to *Emerald*, there was an overcharge in the prices of airfreight services because of the agreements or concerted practices that BA participated in. The Chancellor of the High Court on application of BA struck out the representative element of the claim.²⁵⁴ This decision was subsequently appealed to the Court of Appeal.²⁵⁵

The Court of Appeal held that it was not even possible to determine whether the numerous claimants were members of the represented class before the question of liability had been tried. According to the judgment, the entire class would need to have the ‘same interest’ throughout the entire proceeding, something that was not possible to determine when there was no certainty about BA’s liability.²⁵⁶ The second problem, according to the court was that since *Emerald* wanted to represent both direct and indirect purchasers, there was a

²⁴⁹ Hodges 2009, 109.

²⁵⁰ Sorabji, 257. For a more detailed comparison of the differences between the GLO and ‘classic’ class actions, see Mulheron 2005a, 47-49.

²⁵¹ Mulheron 2005b, 427.

²⁵² Hodges 2009, 109.

²⁵³ See *Airfreight Case COMP/39258*. At the time of the application no final decision had been taken in the matter. Later British Airways along with 10 other undertaking were fined in total 799 million euros.

²⁵⁴ *Emerald Supplies Ltd & Anor v British Airways Plc* [2009] EWHC 741 (Ch) (08 April 2009).

²⁵⁵ *Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284 (18 November 2010).

²⁵⁶ *ibid*, paras 62-63.

possibility that they would not have the same interest, as the same defence was not available to all of them. As an example the court mentioned that BA could perhaps successfully run a defence against those who has passed on the inflated price, but not against the others.²⁵⁷ As a result the Court of Appeal dismissed the appeal of the claimant.

An interesting peculiarity of the Court of Appeal Judgment is that Lord Justice Mummery in his introduction remarks that:

It is asserted that forms of collective redress are now widely regarded as essential for breaches of competition law. Without them there are difficulties in ensuring effective compensation for law-abiding businesses and consumers on whom huge costs are imposed by illegal price-fixing. The issue of redress for price-fixing is so pressing that it is currently under consideration by the EU Commission, the UK Office of Fair Trading and the Civil Justice Council.²⁵⁸

Emerald as a case has been seen to demonstrate the shortcomings of the CPR multi-party litigation rules to provide collective remedies²⁵⁹. With this background it is interesting that the choice that has been made in the UK is to introduce a specific sectorial class action instrument for competition law damages actions, applicable in a court specialized on competition law cases. What must however be pointed out about *Emerald* and the attempt to use the representative rule for collective litigation is that it is worth to question if a rationally designed class action instrument would allow for class actions with a class consisting of direct and indirect purchasers. This seems highly unlikely, given that it is common with some kind of certification criterion that requires that claims are similar.

4.4.2 Collective Competition Law Damages Actions

First Steps: Providing Collective Redress for Consumers

In 2002 a form of class action for damages caused by antitrust breaches was introduced in the UK. This class action was a representative action. Only consumers could be represented as victims.²⁶⁰ Hodges has described this model of collective consumer redress to be ‘statute-based mechanisms that are principally regulatory in nature’.²⁶¹

Following the 2002 reform, section 47B was introduced in the Competition Act 1998. Section 47B enabled opt-in class actions to be brought to the CAT on behalf of consumers. At

²⁵⁷ *ibid*, para 64.

²⁵⁸ *ibid*, para 2.

²⁵⁹ See Rodger 2013, 64.

²⁶⁰ See section 19 of the Enterprise Act 2002, see also explanatory notes to the Enterprise Act 2002, section 19, paras 74-80.

²⁶¹ Hodges 2009, 106.

this time, only follow-on actions could be brought to the CAT. The collective claims needed to be brought by a specified body, determined by an order of the secretary of state.²⁶² The only entity that was given this status was the Consumer Association Which?.²⁶³

One of the most known attempts to seek collective redress for consumers following an antitrust violation was the collective proceeding that the Consumer Association Which? brought to the competition appeals tribunal under section 47B of the Competition Act 1998. This is also the only action that has been brought by Which? under its status as a specified body for bringing consumer representative claims. The actions for damages were made following a cartel finding by the Office for Fair Trading, in other words the NCA in the UK at the time in question. The CAT also later upheld the cartel decision. In the CAT judgment in question, the sports-store JJB Sports was issued with a GBP 6.7 million fine for fixing prices of replica football shirts along with 7 other undertakings.²⁶⁴ Which? then brought action against JJB Sports to claim back the overcharge paid by consumers that had purchased football shirts at the time of the price fixing.²⁶⁵

Initially Which? brought the claim on behalf of approximately 130 individual consumers.²⁶⁶ According to media outlets at the time, Which? estimated the amount of potential consumers eligible to claim compensation for the cartel damages to be ‘hundreds of thousands’.²⁶⁷ The biggest disappointment and failure of the class action was without doubt the overall number of consumers that in the end opted in to the proceedings. It has been suggested that the number of consumers opting in was reduced due to the fact that JJB offered customers free football shirts and mugs as compensation shortly after that the actions were initiated by Which?. Consumers choosing to accept this offer were then precluded from opting in to Which?’s action.²⁶⁸ In some ways it could, as Rodger points out, be perceived that there was a ‘positive indirect effect’ of the threat of a claim as this initial goodwill gesture by JJB Sports was accepted by approximately 12 000 consumers.²⁶⁹

Eventually, JJB sports and Which? agreed on a settlement in regard to the claims. The settlement provided all consumers that had opted in to the action a compensation of GBP 20.

²⁶² See section 18 of the Enterprise Act 2002, see also explanatory notes to the Enterprise Act 2002, para 78.

²⁶³ See for example Rodger 2015, 278.

²⁶⁴ See *JJB Sports plc v Office of Fair Trading*.

²⁶⁵ See *CAT notice for claim for damages under section 47b of the Competition Act 1998*.

²⁶⁶ *ibid.*

²⁶⁷ Mulheron, 2008a, 42.

²⁶⁸ *ibid.*, 43, Rodger 2015, p. 270 see also BBC News 13.2.2007: *JJB offers free football shirts*.

²⁶⁹ Rodger 2015, 270.

In the end, the number of consumers that had opted in to the claim was 500.²⁷⁰ As a result of the settlement, JJB also agreed to pay a compensation of GBP 10 to consumers that did not opt in but had however bought a football shirt at the time of the price fixing.²⁷¹ It has been estimated that only 1 % of these consumers claimed their compensation.²⁷²

According to media sources, the assessment made by Which? after that the process had been carried through was that it was ‘costly, time consuming and offering little reward’. The relative low value of the damage caused, and consequently compensation awarded to individual consumers was another aspect that Which seems to have thought did not provide consumers with enough incentives to opt-in.²⁷³ After these actions, for example Mulheron criticized the section 47B class action model at the time, arguing that the case could have been much more effective under an opt-out regime allowing for award of aggregate damages.²⁷⁴

2015 Reforms: A Broader Approach to Class Actions for Competition Law Damages

With the introduction of the 2015 Consumer Rights Act 2015, a number of reforms were made to section 47A and B on claims for damages and collective actions in the Competition Act 1998.²⁷⁵ First, opt-out actions have been made possible and collective actions can now be brought as stand-alone actions. In addition, the right to collective action is no longer restricted to situations where consumers have been inflicted harm, as the claimants eligible to be represented as a class in a collective action can consist of consumers, businesses, or even a combination of these two.²⁷⁶

The criteria for certification of a collective action are found in rule 79 of the CAT rules 2015. According to this rule the action has to be brought on behalf of an identifiable group, raise common issues and be suitable to be brought in collective proceedings. When determining if the action is suitable to be brought in collective proceedings, the rules set out that the tribunal may take into account all matters it sees fit. These matters may include the appropriateness of collective actions for a fair and efficient resolution of the common is-

²⁷⁰ The Lawyer, 1.12.2008: Class action is one big headache, says Which?.

²⁷¹ Which? 9.1.2008: *JJB to pay fans over football shirt rip off*,

²⁷² Sorabji, 533.

²⁷³ The Lawyer, 1.12.2008: Class action is one big headache, says Which?.

²⁷⁴ Mulheron 2008a, 41-42.

²⁷⁵ See schedule 8 of the Consumer Rights Act 2015.

²⁷⁶ See explanatory Notes to the Consumer Rights Act 2015, para 434.

sues, costs and benefits of collective proceedings and if members of the class have already initiated separate proceedings of same or similar nature. Also the size and nature of the class, whether it is possible to determine in respect of any person whether that person is or is not a member of the class, the suitability of the claims for an aggregate award of damages and the availability of ADR and other means of resolving the dispute are matters that may be taken into account. Under the new section 47C in the Competition Act 1998, the court may award damages in an aggregate amount, meaning that the court does not need to assess the amount of damages recoverable in respect of the claim of each represented person.

The amended section 47B also gives CAT the discretion to determine if proceedings should be opt-in or opt-out proceedings. Rule 79(3) of the CAT rules 2015 outline that the court when determining this 'may take into account all matters it sees fit'. Among the matters the CAT should take into account when determining if claims are suitable to be brought as collective proceedings, be the strength of the claims, if it be practicable to bring proceedings as opt-in having regard to all circumstances, and estimated amount of damages that might be recovered by class members. In the case of an opt-out action where awards are left unclaimed, according to Section 47C (5) a cy-pres mechanism will be utilized and windfall awarded to a specified charity.

The 2015 Consumer Rights act also introduced an amendment in regard to standing. In contrast with the earlier situation where only a specified body was entitled to bring cases, now the scope on who can bring actions is wider. A person proposing to be representative will bring the actions, and there is now significantly more flexibility in regard to who can act as a representative. CAT can according to the amended subsection 47B (8) authorize the person bringing a claim to act as a representative in the collective action whether or not he or she is a class member, only if it considers it 'just and reasonable for that person to act as a representative' in the proceedings. In this way, it does not seem excluded that a person actually holding a claim would act as the representative. Despite of this, the explanatory notes as an example set out that 'The new subsection (8) will enable any appropriate representative, such as a consumer body or trade association to bring claims on behalf of consumers or businesses'. Therefore it seems that it is not individuals that has in first hand been considered as potential representatives under the amended rules.

Rules 77 and 78 of the CAT rules 2015 outline the judicial test that the tribunal will apply when determining if a representative will be authorized to act on behalf of the class or not. According to rule 78, the CAT shall consider, *inter alia*, if the proposed representative would act fairly and adequately in the interests of class members, potential material interests of the proposed representative in conflict with those of the class members and if the proposed representative will be able to pay the defendant's recoverable costs if ordered to do so.

In the Government response to the consultation on option for reform it was stated that only entities with 'a genuine interest in the case' should be able to bring them. It was in the government response not seen to be desirable that entities such as law firms or claimant vehicles would be allowed to bring actions.²⁷⁷ It has however been pointed out that there in the amended rules exist no explicit prohibition on these kinds of entities bringing actions and that as a matter of fact it could be possible that for example law firms would pass the judicial test regarding its suitability as a representative.²⁷⁸ Compared to the earlier legal situation, there is more flexibility in regard to who can bring claims. The previous system where only Which? was entitled to bring claims can be seen to have created significant barriers for bringing collective claims. Hence it can be said that the system of having statutorily defined representatives has been amended to a more flexible judicial control of class representatives. This reform will hopefully facilitate the bringing of actions.

4.5 A Very Uneven Playing-Field

In this chapter the collective redress regimes of only three member states have been examined. However already these three systems have class action instruments that differ a lot in regard to their scope, standing to bring actions, as well as other important characteristics. Already from this short overview of different collective redress instruments in member states, it is possible to draw the conclusion that conditions for collectively claiming damages for antitrust infringements vary significantly throughout member states. If one of the purposes of introducing the Directive was to harmonize the conditions for claiming damages, not including collective redress in the Directive has significantly undermined this goal, as there is such diversity in regard to how class actions can be used.

²⁷⁷ 2013 UK Government Response, 34.

²⁷⁸ Rodger 2015, 277, 279.

The diverging models of collective redress will of course have an effect on both the compensation and deterrence created through private enforcement. The process on introducing class actions has to a large extent been focused on consumers, especially as seen in Finland and the UK. Interestingly, often businesses with claims have taken initiatives in regard to bringing different forms of collective or aggregated claims.

That there are attempts to bring different forms of aggregated or collective claims even without formal structures show that there is at least to some extent a ‘demand’ of them. It is worth considering if these ‘ad-hoc’ collective actions create greater risks than the risks of abusive litigation and legal blackmail that are always mentioned when discussing the introduction of class actions. An argument for creating formal structures for collective redress could be that they still provide more legal certainty and security for both claimants and defendants than these ‘informal’ collective actions do.

The different models on collective redress and the different rate of use also provide a few conclusions. It seems like greater flexibility in regard to standing and financing of cases will enable actions to actually be brought. In Finland and UK a class action system with a single entity having standing has led to that few or no cases have been brought.

An interesting question for the future will be how the reformed class action regime for private competition law actions in the UK will be used. This is interesting both from the point of view of how many actions actually will be brought, as well as how the CAT will use its increased powers of judicial discretion. How will the CAT determine suitability of representatives or if a case will be opt-in or opt-out? The possibility for opt-out also enables the UK model to be used as a deterrence creating, rather than compensatory instrument. The choice to concentrate all competition law actions for damages to one court, a decision already made in the UK and one that will possibly be made in Sweden, might in practice facilitate bringing actions and obtaining compensation due to the specialization of the court.

Table 1: Key Characteristics of Class Action Mechanisms in Finland, Sweden and the United Kingdom.

	Finland	Sweden	United Kingdom
Legislative basis	❖ Ryhmäkannelaki (444/2007) (Act on Class Actions)	❖ Lag (2002:599) om grupprättegång (Group Proceedings Act)	❖ Competition Act 1998 (with Consumer Rights Act 2015 amendments).
Scope	❖ Civil actions between consumers and businesses.	❖ For individual actions when the lead claimant has a claim covered by the class action. ❖ Organizational actions in civil actions between consumers and businesses. ❖ Public class actions where the authority making the claim is in regard to the dispute suitable to bring actions on behalf of the class.	❖ Stand-alone and follow-on competition law damages actions. ❖ Claims held by consumers, and/or businesses.
Applicability in competition law damages cases?	❖ Applicable, if consistent with the general scope.	❖ Applicable.	❖ Exclusively applicable for private competition law claims.
Standing to bring actions	❖ The Consumer Ombudsman.	❖ Individuals ❖ Organizations, specified in the Group Proceedings Act. ❖ Select authorities, assigned by decision of the government.	❖ Representatives whose suitability has been determined by CAT.
Criteria for certification of class	❖ Claims of similar individuals towards same defendant based on similar grounds. ❖ Hearing of the case expedient in view of size of the class. ❖ Subject matter of claims, evidence presented and class identified precisely enough.	❖ Claim is based on circumstances that are common or similar for the claims of class members ❖ An action is not unsuitable because the claims of class members are to their grounds significantly differing from the other claims. ❖ The majority of the claims in the class action can not just as well be brought as individual claims by class members themselves ❖ The group is sufficiently identified in regard to size, scope and general conditions	❖ Brought on behalf of identifiable group. ❖ Raises common issues ❖ Is suitable to be brought as collective proceeding.
Opt –in/-out	Opt in	Opt in	Both opt-in and -out.

5. Is There a Need For Class Action Instruments in Member States

5.1 Arguments for Introducing Class Action Mechanisms

In chapter 3 the functions of class actions were discussed. How these functions can serve overall antitrust enforcement and private antitrust enforcement, as well as the commission's approach was briefly outlined. Chapter 4 provided some examples of how these functions both successfully and unsuccessfully have been adopted into practice. What is however important to understand is that although the potential functions of class actions can seem beneficial, they alone are not enough to assess if there is a need for class actions or if it is the right alternative from the point of view of regulatory theory. This chapter will more in depth try to assess these questions first by introducing two theoretical sets of questions. The first set will be for assessing if there is a need for class actions, and the second if class actions can be seen to be the suitable regulatory instrument. As will be seen, some of these questions have already partly been answered, whereas others will be answered throughout this chapter.

5.1.1 Arguments for Assessing the Need for a Class Action Instrument

Oker-Blom has suggested that assessing whether there is a need to introduce a class action instrument can be done through considering the following questions:

- ❖ Does there exist a specific problem that should be corrected or is there a need to enhance a specific direction of development?
- ❖ Can class actions have positive welfare effects?

The first question is also related to the two functions of class actions discussed in chapter 3, in other words does there exist a need for creating access to justice or deterrence through internalization?²⁷⁹ Following the Directive, it can be said that the problem that needs to be addressed, alternatively development that needs to be achieved is giving victims entitled to claim compensation access to justice. Taking into account the way that the ECJ has underlined the role of private actions for damages in strengthening the overall functioning of EU competition rules, it can at least to some extent be argued that there is also an additional need to enhance deterrence.

²⁷⁹ Oker-Blom, 99.

The question regarding welfare effects can in essence be translated to if the benefits of class actions would outweigh its costs.²⁸⁰ This is especially relevant when taking into account Wils's view on how private enforcement has no added value to the overall enforcement of competition law. The question related to welfare effects will be considered in the especially in chapters 5.2 and 5.3.

5.1.2 Arguments for Assessing if Collective Redress is the Right Regulatory Alternative

Kanniainen, Määttä and Rautio has suggested that when considering the benefits of class actions compared to other regulatory alternatives, the relevant criteria to take into consideration are:

- ❖ The advantage of information a public authority might have compared to a private party.
- ❖ Whether entities that might be held liable in class actions will be able to pay the damages ordered.
- ❖ How likely it is that the harm to be addressed through the class action mechanism would in the end be brought in front of a court?
- ❖ The transaction costs of private and public operators in a class action regime compared to administrative costs of public enforcement.²⁸¹

As seen in the previous chapter and as will be repeated below, private enforcement of competition law and introducing a collective redress system would not alone satisfy these criteria.

In regard to the first criteria competition authorities have a clear information advantage over private actors, a fact that is further underlined when considering the scarcity of stand-alone actions. Most private enforcement of competition law as a matter of fact relies on piggybacking on the information advantage and enforcement powers of public enforcement. In regard to the last criteria, as seen in chapter 2.1.3 it has been held that private enforcement is costlier than public enforcement.

In the context of the Directive on antitrust damages actions and the leading role of public enforcement, the question can be reformulated to what need there would be for a collective

²⁸⁰ *ibid*, 104.

²⁸¹ Kanniainen, Määttä and Rautio, 171.

redress instrument that would be complementary to public enforcement and have as its objective to efficiently provide full compensation for victims. Consequently it can be asked what cost such a mechanism would have and how it could be fitted in the overall enforcement framework.

Especially the questions regarding how likely it is that harm would be taken to court and how high the transaction costs would be in a collective redress regime are interesting. Regarding the first of these questions, chapter 4 already in many ways outlined how decisive the way a class action instrument is designed in regard to especially standing and financing is dependent on if harm will end up in front of a court. Also the choice between opt-in and opt-out plays a role. All these questions will be further discussed, especially in chapter 5.3. The question of both transaction and other costs created by class actions is also discussed especially in these chapters. In regard to the risk of overenforcement but also the objective of compensation, the question regarding if liable entities will be able to pay is one of relevance, especially since the ‘double-disgorgement effect’ of follow-on actions was earlier noted. These questions will also be answered in the following chapters, the question of overenforcement in chapter 5.5.

A central problem in assessing both the need for class actions, as well as if it is the most sensible regulatory alternative is that in some ways, the overall ‘enforcement gap’ that is to be filled is a bit unclear. The need and appropriateness of class actions can of course be argued for because of the subjective right victims have to claim compensation. This right is however motivated by a broader public consideration of optimizing overall enforcement, according to many by adding deterrence. From this point of view it can in many ways be seen that knowing if class actions would be appropriate is a question hard to answer when not knowing exactly what ‘gap’ in the enforcement it should be filling. The following chapters will outline some alternatives concerning this, especially in regard to creating consumer welfare.

5.2 Costs and Welfare Effects of Class Actions

Compensatory justice is a tool redistributing wealth from wrongdoers to victims. For individual victims, obtaining damages will of course improve their welfare.²⁸² Taking the costs of compensatory justice into account, compensatory justice does not provide a pareto im-

²⁸² Henriksson, 47.

provement, which would require that compensatory justice would lead to that no one else is left worse off. From the point of view of the Kaldor-Hicks criterion that allows for improvements where someone is made worse off as long as there is an overall welfare surplus, providing compensation might create welfare. This however also depends on external costs.²⁸³

In addition to comparing the cost of providing compensation with compensation obtained by victims, a relevant thing to take into account when assessing welfare effects would be the amount of deadweight loss that has been avoided due to the deterrent effect that providing compensation has had on potential violators. Needless to say, this is an almost impossible approximation to make. The welfare effects of class actions with a compensatory objective would in other words be both the increased welfare of victims, as well as possible welfare effects for society as a whole if the class actions lead to deterrence preventing future violations.

As said above, the efficiency losses prevented by the deterrence caused by class action instruments cannot be accurately estimated. However, what can be estimated is that if class actions are brought as follow-on actions and the public enforcement system already has provided an optimal level of deterrence, the resources that are used on class actions will be excessive for creating welfare through deterrence.

The welfare effects of competition law class actions are likely to be greater than its costs when the deterrent effect of public enforcement are not enough to create optimal deterrence. Because there is in this context no coordination of public and private enforcement and the latter has been facilitated to ‘complement’ the latter it seems that in some cases welfare effects will exceed costs, hence there will be ‘double-enforcement’. This double-enforcement is likely to have a ‘negative-result’, although welfare has been created for individuals. As there is no systematic approach to private enforcement, and individuals will choose to litigate when they expect that it will increase their individual welfare, class actions could not be used only in cases where fines assigned through public enforcement would not be enough to provide optimal deterrence.²⁸⁴

²⁸³ On Pareto and Kaldor-Hicks efficiency, see Cooter and Ulen, 48.

²⁸⁴ See Rosenberg and Sullivan that have designed a system that according to them could address this mismatch in the context of the US system.

It has to be taken into account that class actions have various economic effects that would affect the cost of compensatory justice, both in ways that could lower and increase the cost.

One of the benefits of aggregating multiple claims into one collective proceeding is the creation of economics of scale. Class actions do in this way minimize the cost of litigation. If considering the costs of achieving compensation or creating deterrence through litigation in general, class actions could be a way of creating deterrence and compensation for a lower cost than through individual litigation. Class actions could in this way lower the unit cost of both compensation and deterrence.

What however needs to be noted is that if a class action aggregates multiple individually nonrecoverable claims, new costs are actually created by the class action mechanism. This is of course as the individuals themselves would not have brought claims.

As also joint- or test cases create economics of scale, the economic benefits of aggregating several similar claims into one single proceeding are not on their own enough as arguments when defending class actions. As a matter of fact, although the potential economics of scale, class actions can demand a lot of resources from the judicial system. According to the results of an empiric study done in the US in the 1990's, the time of a judge demanded by an average class action was considerably more than the time demanded in an average civil case.²⁸⁵ Class actions will demand more resources from the judicial system than ordinary civil cases will.²⁸⁶ How much also of course largely depends on if for example damages are awarded aggregately instead of individually.²⁸⁷

5.3 Do Consumers Need to be Compensated

5.3.1 The Role of Consumers in EU Competition Law Enforcement

Diverging Views on the Role of Consumers

Taking into account what has been discussed in previous chapters, most consumer claims born from competition infringements will be individually nonrecoverable claims. These claims will not be litigated at all unless there is a collective redress instrument. The Directive on antitrust damages actions and the case law of the ECJ have led to claims being

²⁸⁵ Willging, Hooper and Niemic, 95-97.

²⁸⁶ Oker-Blom, 104.

²⁸⁷ See for example Lindblom 2008, 103 that points out that the legislative choice not to include a right for a court to order an aggregated amount of damages that would be distributed to class members after the procedure was a loss for the efficiency of the Swedish class action procedure.

dispersed and that the right to seek damages may in many cases end up in the hands of the end-user, in other words the consumer. At the same time the Directive clearly asserts the right to claim and obtain damages.

As pointed out in the second chapter, there was after *Manfredi* a certain legal confusion regarding the individuals entitled to claim damages. Also as Stadler asserts, there was for a long time a scholarly debate on the right of consumers to claim damages for antitrust infringements.²⁸⁸

Consumers have however been on the Commission's agenda from a relatively early stage as already the Green paper 2005 and the subsequent White paper 2008 formulated the need of providing consumers with access to claiming compensation through collective redress.²⁸⁹ The reason to that the Commission in 2013 gave its Recommendation on collective redress for member states was enabling especially consumers and SME's to make low-value claims.²⁹⁰ The question that arises is why there is a desire to empower consumers as private attorney generals of the rising private enforcement regime? Two potential answers are that the Commission either sees the deterrent effect that consumer claims potentially can create as important. Alternatively the Commission values the goal of consumer compensation to the degree that it sees the costs created by providing it as justified. The answer is of course likely to lie somewhere in between these two extremes.

It seems that the member states have different approaches to how much focus should be placed on compensating consumers for harms inflicted on them by competition law violations. For example in Finland, the working group that were in charge of the preparatory work for implementing the Directive on antitrust damages actions in their report concluded that the Directive did not require the introduction of a collective redress mechanism and the national law proposed by the working group would not facilitate claiming widely dispersed damages. As an example the report mentions that the proposed law would probably not facilitate claims made by consumers, while the report estimates that claims made by SME's are going to be somewhat more facilitated.²⁹¹ This is a contrast to for example the UK where there has been a determination for developing collective redress mechanisms for compensating consumers. As in the UK an opt-out mechanism has been adopted, these

²⁸⁸ Stadler, 199.

²⁸⁹ Green paper 2005, 8-9, White paper 2008, 4.

²⁹⁰ Esteva Mosso, Calisti and Haasbeek, 78.

²⁹¹ TEM 46/2015, 42.

mechanisms are also used in order to create deterrence. The examples from just a few member states also shows, as already pointed out, that the conditions for consumers to claim and obtain compensation differs significantly throughout member states.

The Consumer Welfare Standard as a Lodestar

Although articles 101 and 102 have remained almost unchanged since they were included in the original treaties, the goals and objectives of them have developed overtime. This has consequently developed their application. In the last decade, consumer welfare has become one of the central objectives of EU competition law.²⁹² The consumer welfare approach, has however, been criticized for playing a bigger role in festive speeches than in hands-on antitrust enforcement.²⁹³

If consumer welfare is understood as maximizing the surplus of consumers it could perhaps be feasible with a redistribution of wealth from violators to consumers through collective redress mechanisms.²⁹⁴ Ioannidou claims that procedural mechanisms that would enable consumers to participate in competition law enforcement would facilitate ‘an actual adoption of a consumer welfare standard’ as well as facilitate detection of infringements by improving the identification of consumer harm on retail markets.²⁹⁵

In a report prepared for the Nordic Council of Ministers the deterrent effect consumer claims could generate is also underlined. According to the report, deterrence is created also because the threat of consumer claims creates a ‘fear of loss of goodwill’.²⁹⁶

As already noted, in the recent years consumer welfare has become an important standard in the enforcement of EU competition law. In addition it seems that the discussions about how the interests consumer protection and competition law intersect have increased. Here it is however important to note that it is probably not optimal if private enforcement of competition law would develop into a tool for consumer protection. The interest of consumers is one important part of private enforcement, as consumers are an important group of potential victims with the right to claim compensation. To achieve optimal enforcement this interest has however to be balanced with other interests involved.

²⁹² Leivo, Leivo, Huimala, Huimala, 42, Ioannidou, 26-27.

²⁹³ See for example Baarsma who argues that the ‘economic goal’ of consumer welfare is largely blocked from the ‘legal objective’ which according to her is protecting competition, or Daskalova who criticizes the meaning of the consumer welfare standard to be unclear.

²⁹⁴ See the OECD glossary of statistical terms: Consumer Welfare.

²⁹⁵ Ioannidou, 43.

²⁹⁶ Hjelmeng, 23.

5.3.2 Access to Justice for Vigilant Individuals or Representative Opt-Out for Maximal Deterrence

Who is Best Suited to Bring Consumer Claims

As seen in the previous chapter, although there in the Swedish and UK systems of class actions exists a possibility for harmed individuals themselves to bring actions, for ensuring consumer collectives with redress it is often consumer associations or ombudsmen that are assigned with the task of representing consumers in collective actions. As consumers might have few incentives to bring actions themselves, consumer claims in the form of individually unrecoverable claims are unlikely to end up in front of a court unless there is some form of representative action or public class action.²⁹⁷ From the point of view of the regime of private competition law enforcement, this is interesting because of many aspects, not only because it is not at all certain that a cost of such a system will outweigh its welfare effects.

Firstly, the more claimants in class actions are indifferent and passive to their own claims, the more instrumental their role is in regard to the objectives of the class action. The difference between opt-in class actions where claimants themselves initiate actions and representative opt-out actions are good examples of two extremes in regard to this. The first example lowers the litigation threshold²⁹⁸, while claimants themselves still enforce their own rights. In the latter example, claimants can remain passive and indifferent throughout the proceedings (although total passivity will of course inevitably lead to that their share of a possible compensation is distributed through for example a cy-pres mechanism). These kinds of tools will by aggregating the low value claims that would otherwise be left unclaimed primarily serve a deterrent role with an additional compensatory function for consumers. However, in the light of that the right to claim damages and obtain compensation rests on a subjective right of individuals, a representative class action system where the claimants would have this kind of instrumental value would not entirely fit the framework of EU competition law private enforcement.

Considering an opt-out regime where possible unclaimed compensation is distributed by, for example, a cy-pres mechanism is unsound with the principle of full compensation. In such a system, mass claims by representative entities serves the enforcement and deterrence functions rather than a compensatory function.

²⁹⁷ See for example Barker and Freyens, 12.

²⁹⁸ This of course depends on what mechanisms are available for mitigating risks, and costs of proceedings.

It is however important to point out, that the fact of consumers remaining passive do not always mean that they are indifferent. According to Hodges, having drawn his conclusions based on empirical material, consumers are more likely to bring low-value claims the easier it has been made to bring a claim.²⁹⁹ It is very likely that from a consumer collective with all individually unrecoverable claims, there will be no one that has sufficient incentives to act as lead claimant. This view of course advocates for opt-in representative actions.

Secondly, it is relevant to consider from where the funding of representative entities would stem. In both Finland and Sweden a consumer ombudsman has been assigned to bring public class actions on behalf of consumers. It can however be questioned if this model is the most suitable for private enforcement of competition law. Giving the responsibility to make claims on behalf of consumers to a public authority would eradicate the ‘private’ in private enforcement. In this sense the private enforcement would de facto stop relying on interested private parties that would bring actions and through this indirectly enforce competition rules for the public benefit. With a strong public enforcement machinery operating with the objective of consumer welfare, it is worth to ask whether this would be an efficient solution.

Shifting the responsibility to make claims to public authorities incurs administrative costs that are to be borne by the taxpayers. Previously, it was mentioned that public class actions in Sweden are to be brought only in case of a special ‘public interest’. It is very likely that a public representative entity cannot act when the only interest that is to be safeguarded is that of providing compensation for a class of consumers (although the class can consist of numerous consumers). If the main function of the collective redress mechanism is to act as a compensatory mechanism, it does not seem legitimate that a public entity should bear the risks and costs of proceedings. It cannot, according to Välimäki be claimed that mechanisms that are strictly compensatory in nature and only concerned with enforcing the subjective rights of individuals would create any benefit from the point of view of public interest.³⁰⁰

Even if the representative entity would not be publicly funded, in representative actions, the entity in charge of taking the action forward is the fact of not enforcing its own rights but

²⁹⁹ Hodges 2014, 815.

³⁰⁰ Välimäki, 5.

the rights if others.³⁰¹ Simultaneously, the right to compensation becomes dependent on the discretion of the representative party. Here it is worth to note that the right to compensation becomes dependent of the funding of the representative entity. What is essential, in order to ensure claims being brought, is to not concentrate the right to bring claims in the hands of one single entity.

There should be flexibility also in regard to the interest the representative entity is required to have in regard of the interest of the class. Requirements regarding interests of the representative can of course prevent parties only having a business interest in bringing claims, to act as representatives. Despite of this, requirements that have a too narrow scope can also prevent very suitable representatives from bringing claims. The link between the representative entity and the individual's subjective rights can vary a lot depending on the representative entity. An illustrating example was the association of enterprises that brought a claim in Finland in the 1990's³⁰². This association can be seen to have functioned as kind of a 'claimant vehicle' without any commercial interest for acting as a representative. Another example is the Swedish Skandia case where claimants transferred their claims to a non-profit association that then acted as a lead plaintiff.³⁰³ In these examples claimants have had a more active role in enforcing their own rights, as opposed to for example *JJB Sports* where an association with a general interest for consumer rights was the one initiating actions. What is important is that different situations and infringements will cause different needs. Therefore the determination of a suitable representative entity should be relatively flexible.

Stadler suggests that damages actions brought by representative entities should only be introduced when they are the only way to enforce the law.³⁰⁴ When it comes to providing consumers with compensation for antitrust infringements, this might be the case. Again, to which extent and how this should be done depends on the value that is attributed to providing compensation. However, if mass claims are aggregated to primarily to provide compensation, not to create deterrence, it can be questioned how significant the role of providing this compensation would be in the overall enforcement framework, especially as providing compensation is costly. This is especially problematic in cases where consumers

³⁰¹ Impact Assessment Study 2007, 273.

³⁰² See text to n 216.

³⁰³ Note however, as already mentioned in chapter 4.3.1 that Skandia was in the framework of the Swedish Group Proceedings Act brought as an individual class action.

³⁰⁴ Stadler, 205.

are more or less indifferent to their own loss. To ensure at least some kind of access to claiming compensation for consumers, representative opt-in actions would be the most suitable ones. As mentioned above it is however questionable to which extent these should be publicly funded, given the existence of a public enforcement system. On the other hand, if the aim of bringing these representative proceedings would actually be to create a mechanism that creates deterrence, a publicly funded opt-out instrument could be motivated. If this would be the case, it can however be questioned why not, just as proposed by Wils, increase public sanction levels instead.

It is not motivated to close the door for individually initiated class actions. Also consumers might in some cases very well manage to create arrangements such as the ones in Skandia, mentioned above.

Consumer Class Actions and Different Types of Harm

As the type of harm that have been caused depend a lot on the violation that has caused it, it is impossible to say what the overall effect and usage of a collective redress mechanisms for consumers would be. According to Wahl, although a class action mechanism would exist, given the fact that consumers are end-users in what might be a long and complex supply-chain they are in many senses ‘too far away to be able to note or value a certain violation’.³⁰⁵ Mobilizing consumers in more complex litigation, where the harm would have been passed on a supply chain to its end-users seems unrealistic, specially taken into account the modest enthusiasm among consumers for opting-in, or even presenting their claims after the settlement in a straightforward case like *JJB Sports*. It is worthwhile to remember that in cases where consumers are not direct purchasers they will be in a position where it is harder to demonstrate causality between the harm and infringement. Thus, also legal uncertainty is an obstacle preventing class actions from being brought. Needless to say, the obstacle of legal uncertainty will grow together with other obstacles already discussed, such as few representative entities having a standing.

In this context it is also relevant to compare the harm caused by competition law infringements with other types of mass-harm that are usually seen as suitable for (consumer) class actions. In mass harm situations such as cases concerning product liability or harm caused by environmental damages, there is always a preceding physical damage. In this sense,

³⁰⁵ Wahl, 250.

competition law damages, although comparable in the sense of being widely dispersed mass-harm, still diverges because of it being pure economic loss.³⁰⁶ Despite of this, cases where consumers are direct purchasers and the individual overcharge can be measured in a relatively straightforward manner are comparable to for example product liability cases. On the other hand, also in these situations a significant amount of time will usually pass from initial purchase to when claims are made. In these situations it seems to be quite likely that for example proofs of purchase will be hard to produce.

It can also be questioned if some claims can become so dispersed so that the transaction costs (or to express it in less economic terms, the time and effort) for recovering compensation become too high. An example of this is *JJB Sports* where few consumers recovered their compensation although it could easily be obtained by presenting a proof of purchase. In cases of pass-on claims of more significant sums, maybe consumers could after-all be incentivized to make claims if there would exist mechanisms for easily doing this?

In cases where consumers are direct purchasers and perhaps the most ‘central’ group of victims to an infringement, it is not motivated to say that consumers should not be able to bring actions and be compensated. It can be quite straightforward (or as straightforward as actions for damages for competition infringements can be) to claim compensation for consumers that all have the same homogenous claim due to a price-fixing cartel that has directly fixed prices of consumer end goods, the *JJB Sports* case being a prime example. It is also worth to notice that although many consumer claims are individually irrecoverable, they are not always of such a small size that consumers would be indifferent to them like in *JJB Sports*.

To conclude, although the availability of the pass-on defence, it seems very likely that especially because of the prevailing legal uncertainty regarding damages actions, class actions would be most efficient in situations where consumers have been inflicted direct harm.

5.3.3 Other Routes to Compensatory Justice for Consumers

As earlier mentioned, class actions might be the only way to provide compensation for individually irrecoverable claims. This statement however only holds true if it is meant that compensation is to be sought by the means of civil procedure. It should here be noted that

³⁰⁶ See text to n 85.

some of the harm that will be inflicted upon consumers through competition law infringements, for example when a consumer refrains from buying a product because of the higher price, is not easy to compensate through tort law.³⁰⁷

The path that has been chosen by adopting the Directive on antitrust damages actions is that compensation should be sought in national courts. It feels quite self-evident that opt-out cases where unclaimed amounts of damages are distributed with *cy-pres* mechanisms are not compatible with the objectives of the Directive on antitrust damages actions or the overall enforcement. In addition, consumers might not have enough incentives to join opt-in actions to reclaim their relatively small claims. Hence, it can be questioned if compensation for consumers should be provided in some completely different fashion. Especially the fact that a big amount of claims might not end-up in front of a court because of potentially low opt-in rates, show that opt-in actions are perhaps not the best regulatory choice for systematically compensating consumers.

When considering alternative options, what firstly needs to be considered is to what extent the compensation paid to taxpayers, in other words, administrative fines, can be seen as a sufficient compensation for the consumer collective. Between this alternative and the alternative of providing individual compensation to all victims, Ezrachi and Ioannidou in 2011 proposed that public enforcement could be used as a mechanism of also providing compensatory justice.³⁰⁸ For example, NCA's and the Commission could redistribute part of the fines issued for infringements. Alternatively a 'compensatory part' could be added to the fine, creating an additional deterrent effect.³⁰⁹ To a large extent the model proposed by Ezrachi and Ioannidou contains many of the same problems as class actions, in regard to for example the identification of victims. As repeated many times, it can also be questioned to which extent public authorities should carry administrative the costs of compensating individuals if there be no any additional enforcement benefits that could not be reached by traditional public enforcement.

It is also worth considering what alternatives there are in the scope of civil procedure. In commercial or civil cross-border cases where the value of a claim does not exceed 2000 euros, a so-called European small claims procedure has been introduced.³¹⁰ For the Euro-

³⁰⁷ Hjelmeng, 22.

³⁰⁸ Ezrachi and Ioannidou, 205 ff.

³⁰⁹ *ibid*, 212.

³¹⁰ See Regulation (EC) No 861/2007.

pean small claims procedure there is no need for a lawyer and the procedure is initiated by submitting a standard claim form with description of evidence and relevant supporting documents to a court with jurisdiction in the matter. The court in a written procedure then handles the claim. It could be asked if this kind of model could perhaps be used in situations of consumer harm because of competition law infringements. The problem of these actions are that the complexity of competition law damages actions cases can be hard to fit into the framework of a simplified procedure.

As harm and causation would need to be proved, one alternative of a ‘semi-class action’ could be that liability would first be tried for a class of claimants in an opt-out action, initiated by a public or representative entity. After this the consumers belonging to this class could present their separate claims in a proceeding that would be comparable to the European small claims procedure. This kind of model could work in situations where consumers are direct purchasers and the overcharge per purchase is relatively straightforward to establish. In many ways this kind of procedure could combine the benefits of both opt-in and opt-out actions and fit well in the framework of full compensation. The risk from the enforcement perspective is of course that only few consumers utilize the right to make a claim and there is no significant deterrent effect. In this context it can also be mentioned that the European small claims procedure is currently being revised with the intention to bring the 2000 euro threshold to 10 000 euros and enable also SME’s to use the procedure.³¹¹

³¹¹ Commission staff working document 2015.

5.4 Collective Redress for Others than Consumers

It can of course not be assumed that the only victims with individually irrecoverable claims will be consumers. Especially SME's could very well be in the group of victims that will not have incentives to initiate individual actions. The case described in chapter 4.2.1 where multiple claims were transferred and then brought by a association of enterprises³¹², is a good example of that there also for businesses might exist suitable representative entities that could bring representative claims.

Another question is to what extent it is desirable to let also individually recoverable claims to be brought in class actions. The example of claimant vehicles show that there on the market might be an interest to supply these kinds of actions. The question is if there from the enforcement perspective is any sense in doing this? Advocates for the regulatory function for class actions usually see also the aggregation of individually recoverable claims as important in order to achieve the objective of deterrence.³¹³ When it comes to private enforcement of EU competition law, its complementary role motivates that class actions mechanisms should primarily focus on individually irrecoverable claims. As the example of the Cartel Damages Claims company shows, aggregation of individually recoverable claims may very well take place although the lack of formal mechanisms.

As already indicated, it is motivated that class actions that enhance access to justice are also available for others than just consumers. Mandatory class actions that would also aggregate larger claims are however not motivated.

5.5 The Risk of Overenforcement and Impact on Leniency

As indicated various times throughout this study, although there is a compensatory objective, damages will necessarily have some kind of deterrent effect. For the violator, the legal classification of a financial consequence of a violation does not change its economic impact.³¹⁴ In chapter 2, the concept of optimal deterrence was discussed. What happens if sanctions or damages go beyond this optimal deterrence?

Although the stated objective is not deterrence, imagining that there would be mechanisms enabling a low cost-benefit threshold for litigation and every claimant entitled to claim

³¹² See text to n 216.

³¹³ See n 138.

³¹⁴ See n 88.

compensation would do so, the deterrence effects could potentially be overwhelming for undertakings. According to Geradin and Grelier this kind of overenforcement might harm for example investments. Overenforcement is also inefficient, as enforcement is not carried out at the lowest cost possible.³¹⁵

According to Keske, the amount of the preceding sanction in follow-on actions would need to be taken into account in the subsequent awarding of damages in order to ensure an optimal level of deterrence. Hence, damages would need to be adjusted downwards, taking the amount of the already issued fine into account would.³¹⁶ This is not consistent with the principle of full compensation. Geradin and Grelier have suggested that fine reductions could be made, in order to reflect compensations already paid.³¹⁷ The Directive on antitrust damages actions contains provisions relating to consensual settlements that allow NCA's to take consensual compensation of victims in to regard as a factor for lowering fines. In addition to that, not much attention has yet been given to the question on how fines and awarded damages can be adjusted in order not to create overenforcement.

A quite wide concern that has been addressed in the overall discussion on enhancing private enforcement in Europe is whether it could undermine the leniency process that is seen as a cornerstone in the EU's cartel enforcement.³¹⁸ As a matter of fact, ensuring the balance between public enforcement and private enforcement has because of this become a very discussed topic.³¹⁹ The leniency program offers cartel participants that self-report immunity from the administrative sanctions. However, no such immunity is given from the liability for follow-on damages. In this regard it is also motivated to in the design of a class action instrument, make sure that the instrument would lead to such level of deterrence that it would dissuade potential leniency applicants.

5.6 Facilitating Settlements

One of the benefits of collective litigation mechanisms is also be the leverage they give plaintiffs in regard to negotiating settlements. This is especially the case when it comes to individually irrecoverable claims. Claimants that are not able to take their cases to court

³¹⁵ Geradin and Grelier, 18.

³¹⁶ Keske, 76.

³¹⁷ Geradin and Grelier, 20.

³¹⁸ Komninos, 149.

³¹⁹ Aine, 77-83.

have little bargaining power when it comes to negotiating a settlement.³²⁰ A significant amount of class actions never make it to trial but are in the end settled.³²¹ This has also been seen throughout this study as many of the class actions or collectively pursued cases that have been discussed have in the end been settled. As settlements bring a definitive end to large-scale proceedings and significant transaction costs can be avoided through them they can be seen as beneficial for both the defendant and the claimants.³²²

As mentioned in chapter 2.2, articles 18-19 of the Directive on antitrust damages actions contain provisions to facilitate consensual dispute resolution. In this context it should be mentioned that the possibility for certain groups of victims to be compensated through consensual dispute resolution is probably higher if there is a collective redress mechanisms available. This is because collective redress mechanisms give victims a certain leverage that probably also motivate defendants to provide consensual compensation.

³²⁰ Silver, 201.

³²¹ For an empirical analysis see Willging, Hooper and Niemic, 143.

³²² Weinstein, 176.

6. What Should a Possible Class Action Instrument Look Like

6.1 Standing

Both to enhance the right to compensation as well deterrence it is necessary to grant standing to actors that will be able to bring cases. Taking into account the case law the right to claim compensation stands on, a natural choice would be to let individuals themselves have standing in cases that concern enforcing their own rights. In the case of a representative action, both the examples from the UK and Finland seems to indicate that appointing only one entity to bring claims will most likely generate a very restricted number of actions. Assigning for example the court that will certify the action to assess the suitability of the representative entity, as in the amended UK Competition Act 1998, will allow for more flexibility. At the same time there is some minimum control of the suitability of the representative entity, preventing representatives not acting in the interest of claimants to bring actions.

6.2 Complementary Function, Enforcement of Subjective Rights and Avoidance of Excessive Deterrence – the Case for Opt-In

As already addressed, the foundations for claiming antitrust damages in the EU lies on the individual's subjective rights to make claims, created by the need for full effectiveness of EU law in the member states. When it comes to serving mass justice, it is often the interests of the collective that prevail. A good example of this is collective actions that stretch the boundaries of individual autonomy in civil proceedings as it is the lead claimant or representative that brings the claim and appears in court in proceedings with an outcome that has binding effect on the entire class. How much these boundaries are stretched depends on how the instrument is designed in regard to opt-in or out, as especially opt-out cases have been criticized for stretching the boundaries of autonomy too much.³²³ Although this standpoint could be criticized for being too formalistic³²⁴, the rights-based approach adopted by the ECJ could to some extent be said to advocate a system that observes party autonomy. Both the Commission recommendation 2013 and the resolution on collective redress adopted by the European Parliament³²⁵ advocated for an opt-in approach to class actions.

³²³ Higgins and Zuckerman, 21-31.

³²⁴ *ibid*, 21-22.

³²⁵ European Parliament resolution 2012.

The instrument that would seem to fit the compensatory purpose of the Directive the best would be an opt-in class action, open for both consumers and businesses. Opt-in would be the suitable solution as this would provide access to justice while it would still be up to the individuals if they want to exercise their right to claim compensation or not. As the mechanism would in itself not seek to create deterrence, it would from this perspective not be a problem that opt-in regimes will not ensure the same rate of deterrence as opt-out regimes.

An opt-in regime would however very likely mean that not all victims would be compensated, as it has already been seen that opt-in regimes attract lower numbers of participation. It can however be claimed that the *Courage* case law and the Directive first and foremost puts emphasis on the right to a remedy, not the need for everyone to be compensated although they would remain passive. Although the threshold for participating in litigation is lowered, the opt-in action leaves the decision to seek vindication in the form of compensation up to the rights-holder. According to Sorabji ‘this is where it belongs’.³²⁶

6.3 Financing of Cases

As addressed earlier, the usual concern when discussing the introduction of class actions is the worry of an uncontrolled wave of unmeritorious cases leading to legal blackmail. This critique is not unique to the process of introducing class actions as a remedy to breaches of EU law. For example the narrow scope of application of the Finnish Act on Class Actions has been widely attributed to the active resistance of businesses.³²⁷

It is worth to pose the question if these concerns would be better addressed in the process of actually determining who is entitled to claim damages and when that has been established, focus on how claimants will actually have access to justice. As repeated several times, a crucial aspect for actually enabling claimants to bring actions is that there is sufficient flexibility in regard to financing of the cases.

Whereas class actions are needed to lower the litigation threshold, in some cases it is motivated that claimants themselves carry a proportional part of the risk and financing of actions. The Swedish Skandia case was a good example of how individuals themselves managed to pool the risk and arrange the financing of the action. This experience shows that it

³²⁶ Sorabji, 537.

³²⁷ Välimäki, 8-11.

cannot be excluded that consumers would not in any case have sufficient interest to organize a class action, provided that there are formal structures allowing for it.

Although the US system of contingency fees is not a desirable one, the Swedish experience shows that perhaps allowing for some kind of conditional fees is motivated in order to facilitate bringing cases. This might to some extent compromise claimants right to ‘full compensation’ but if it is the only way to attain compensation, it must be seen as an acceptable necessity. This argument is further supported by that claims vehicles in many ways already use business models, which are similar to contingency fees.

Although conditional fees would to some extent be allowed, it is motivated to safeguard and ensure the interests of the parties. A way of doing this is to, as outlined in the Swedish Group Proceedings Act, require that conditional fees be judicially approved. Alternatively, as outlined by the Commission recommendation 2013, it can be required that a public authority regulates funding arrangements.³²⁸ Safeguards like this are motivated from the point of view of the right to full compensation.

³²⁸ Commission recommendation 2013, 32.

7. Final Remarks

In the previous chapter some leading principles for the design of a class action mechanism that would enhance the objectives of the Directive on antitrust damages actions have been presented. These principles aim to reconcile various objectives, difficulties and characteristics of competition law private enforcement and class actions that have been presented and analyzed throughout this study. As different objectives usually clash, some compromises will always need to be made.

One of the most challenging of these objectives is that of full compensation. Choosing full compensation as the flagship for facilitating and increasing actions for damages was a choice that probably made the idea of the Directive easier to pass through the policy making machine, but a goal that is in numerous ways impossible and impractical. It is however important to acknowledge that while the objective of full compensation is in many ways impractical, it can be used as an argument for trying to compensate so many victims as possible with the amount closest to full compensation as possible. If all potential victims have the right to claim compensation for harm, it is hard to see how this right *de facto* can be exercised without collective redress mechanisms.

The right of all individuals to claim damages for harm caused to them by competition law breaches, combined with the principles of effectiveness and equivalence create a legal foundation for claiming that measures should by member states be taken to improve access to justice also for claimants with individually irrecoverable claims. For now, it seems like there are few feasible alternatives for this outside the scope of class actions.

Representing the other big antitrust regime in the world, the US is often referred to both in regard of class actions and private enforcement. There are many important lessons that can be learned from this model. It has however to be acknowledged that EU competition law partly rests on other values and traditions, and as such no US model can be directly transplanted into the EU. This is also a fact that makes the fears of that private enforcement and class actions automatically will import US-style over-litigiousness exaggerated.

Class action instruments will not as such eliminate all obstacles there is to claiming compensation for harm caused by antitrust infringements. As a matter of fact, some of these complexities such as the legal uncertainty regarding causation and quantification of dam-

ages might also lead to that just few class actions may actually end up in front of courts although the instrument itself is accessible.

Although the 10 years that passed from the Ashurst report to the final adoption of the Directive on antitrust damages actions may seem like a long time, the EU regime of private enforcement has only started to take shape. To ensure optimal enforcement, it is in this process very important to continue the discussion on to which extent actions for damages should have a regulatory function and respectively a compensatory function. Just as was pointed out by Wils already in 2003, the outcome of this discussion will also in the future depend on the value that is assigned to compensation.

While it has to be acknowledged that the development of the private enforcement regime of EU competition law has only started, in regard of many on the phenomena that have been feared to create an overly litigious culture, the future is already here. The existence of claims vehicles and ‘self-made’ collective claims show that there is a demand for collective redress. To ensure the rights of claimants and that the right to full compensation would be achieved to the extent that it is possible, it is motivated that also a formal system where claims can be brought collectively exists in member states.